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THE

COMMON LAW PROCEDURE ACTS

AND

OTHER STATUTES RELATING TO THE PRACTICE

OF

The Superior Courts of Common Law

AND THE RULES OF COURT;

WITH NOTES.

BY
SIR JOHN C. F. S. DAY, ESQ.
BARRISTER AT LAW.

Third Edition.

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ADVERTISEMENT

TO THE THIRD EDITION.

In presenting this Edition to the Profession, the Editor has endeavoured to deserve a continuance of their approval by correction of old matter, and by introduction of recent decisions and of such new legislation as relates to Common Law Practice.

The Editor has been throughout assisted by his *friend Mr.* Maurice Powell, of the Inner Temple, and *to that assistance* are to be ascribed the improvements *which this* Edition presents.

MIDDLE TEMPLE, *April*, 1868.

PREFACE

TO THE FIRST EDITION.

Now that the Common Law Commissioners have made their third and final Report, the proper time seems to have come for presenting to the Profession a complete collection of the fruits of their valuable labours.

The mere gathering together the Common Law Procedure Acts of 1852, 1854 and 1860, and the Rules of Court which have been made by the Judges in order to facilitate their application, would be a very imperfect display of the vast reforms which have been effected by these statutes, and, under them, by the Judges, who have administered the new laws with the most scrupulous and successful regard to the expressed intentions of the Legislature, and to the true benefit of the suitors.

The Editor has, therefore, carefully collected all the reported cases which can assist the Practitioner and the Student to the right understanding and application of the several provisions of these important statutes, and has subjoined notes to assist in the interpretation of those enactments which have not yet definitively received an authoritative construction.

He has, moreover, added, with cases and notes, the

Bills of Exchange Act, 1855, the Mercantile Law Amendment Act, 1856, the Interpleader Acts, and several other Statutes; so as to embody within a small compass the whole of the recent legislation which affects the practice of the Superior Courts of Common Law.

The excellent editions of the Common Law Procedure Acts of 1852 and 1854, by Mr. R. M. Kerr, now the Judge of the Sheriff's Court of the City of London, furnish the groundwork of this Volume; and to that gentleman the present Editor is moreover greatly indebted for much and valuable assistance, even upon those topics which had not presented themselves for discussion at the time of Mr. Kerr's publications.

To his learned friend, Mr. O. B. C. Harrison, the Editor is indebted for the full and convenient Index, which will be found to connect together the various provisions of all the Statutes, Rules of Court, and Cases cited throughout the Book.

As great pains have been taken to collect in the Addenda the cases which have been determined while the book has been passing through the press, the Reader is respectfully requested to note them up in their proper places.

MIDDLE TEMPLE, *February*, 1861.

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c. 122, s. 12	510, n.
c. 131 ..	271
c. 142	206, 207, 323, 360, n.
s. 1	362, n.
s. 3	362, n. *Add.*
s. 5	xx, 323, 468
s. 6	360, 466
s. 7	361, 323
s. 10	354, 323 *Add.*
s. 11	138, n.
s. 12	138, n.
s. 33 ..	322
c. 131, s. 26 ..	271
c. 132 ..	500
13 Vict. c. 4, s. 1 ..	281, *Add.*

ADDENDA ET CORRIGENDA.

*** *The reader is requested to insert in their proper places, the following cases which were chiefly decided while this edition was passing through the press.*

Page 9, *line* 30, *to* "*Fisher* v. *Cox*," *add reference*—"(16 L. T. N. S. 397)."

Page 10, *line* 15 *from bottom, add*—"See also *Barraclough* v. *Greenhough* (L. R., 2 Q. B. 612) cited *post*, p. 104, where under another act 'sufficient evidence' was held by the Court of Exchequer Chamber to mean '*primâ facie* evidence.'"

Page 19, *line* 20, *add*—"In a recent case where the plaintiff had at the London terminus of the defendants, a railway company, taken a through ticket from London to Dublin, and an accident happened during the part of the journey in England, whereby the plaintiff sustained injury; the Irish Court of Exchequer following *Powell* v. *Atlantic Steam Navigation Company* (10 Ir. C. L. App. xlvii. Ex.), overruling *Watson* v. *Atlantic Royal Mail Steam Navigation Company* (10 Ir. C. L. 163, Ex.), held that such a part of the cause of action arose within the jurisdiction as to justify, under 16 & 17 Vict. c. 113, s. 34, an order for substitution of service (*Aston* v. *L. & N. W. Railway Company*, 15 W. R. 694, E. T. 1867)."

Page 20, *line* 11 *from bottom, add*—"see also *Thorp* v. *Browne* (L. R., 2 H. L. 220), and *Briggs* v. *Boss* (3 Weekly Notes, 1868, p. 59, Q. B. H. T.)"

Page 32, *line* 4 *from bottom, and page* 36 *line* 6, *add*—"see also *Carr* v. *Cooper* (1 B. & S. 230), cited *post*, pp. 135, 177."

Page 33, *line* 12 *from bottom, add*—"see *Weeks* v. *Wray* (L. R., 3 Q. B. 212.)"

Page 34 *line* 17, *add*—"(*Cavallier* v. *Michael*, 17 L. T. N. S. 290, B. C. M. T. 1867)."

Page 50, *line* 13 *from bottom, after* "*Notman* v. *Anchor Insurance Company*," *add*—"and *Ganthony* v. *Witan* (2 Weekly Notes, 1867, p. 254, C. P. M. T.)"

Page 54, *line* 2 *from bottom, for* "no," *read* "on."

Page 54, *last line, add*—"see also *Banks* v. *Metropolitan Railway Company* (3 Weekly Notes, 1868, p. 31, H. T. C. P.)"

Page 59, *line* 12, *add*—"Where an action brought in an inferior court, has after declaration been removed into a superior court, the plaintiff must declare *de novo*, and he may declare in a way different to that which he adopted in the inferior court (*Ashley* v. *Ashley*, 17 L. T. N. S. 265, B. C. M. T. 1867, *cor.* Blackburn, J.)"

Page 68, *line* 7 *from bottom*, *add*—"Such a plea must afford a defence to the cause of action, and also to the claim for damages up to the time of pleading the plea, or it will be bad on demurrer (*Ash* v. *Pouppeville*, L. R., 3 Q. B. 86)."

Page 73, *line* 19, *add*—"Nor to the enticing away of the plaintiff's daughter or servant; see *Evans* v. *Walton* (L. R., 2 C. P. 615)."

Page 73, *last line*, *add*—"In a recent case the defendant pleaded an apology, and paid 5*l.* into court under this section, and the plaintiff by his replication admitted the payment into court, and took issue on the residue of the plea; the jury found a verdict for the plaintiff, damages 20*s*. The Court of Exchequer held that the plea not having been proved must not be taken as containing any admission of liability, and that the jury were rightly directed to consider the question of damages independently of the amount paid into court (*Jones* v. *Mackie*, L. R., 3 Ex. 1)."

Page 79, *line* 16 *from bottom*, for—"*Thomas* v. *Knowles*," *read*—"*Thompson* v. *Knowles*."

Page 81, *line* 11 *from bottom*, *add*—"On a rule to enter a nonsuit pursuant to leave reserved, the Court of Exchequer ordered a verdict to be entered for the defendant on one issue without disturbing the verdict found for the plaintiff on another, as that course seemed most consistent with doing justice between the parties. This decision appears to be founded on the rule of costs laid down by this section (*Winterbottom* v. *Lord Derby*, L. R., 2 Ex. 316)."

Page 85, *line* 24, *add*—"*Eagle* v. *Charing Cross Railway Company* (L. R., 2 C. P. 638)" *and to* "*Redway* v. *Sweeting*," *add reference*—"(L. R., 2 Ex. 400)."

Page 89, *line* 14 *from bottom*, *add*—"*Woolley* v. *Aldritt* (17 L. T. N. S. 120, Ex. M. T. 1867)."

Page 93, *line* 31, *add*—"But the Court of Common Pleas has held that a judge has power to extend the time even though the application be made for that purpose after the twenty days have expired (*Nosotti* v. *Hudson*, 3 Weekly Notes, 1868, p. 20, *H. T.*)"

Page 104, *line* 21, *to* "*Barraclough* v. *Greenhough*," *in Exch. Cham. add reference*—"(*Id.* 612)."

Page 115, *line* 10 *to* "*Rigby* v. *Dublin, &c., Railway Company*," *add reference*—"L. R., 2 C. P. 586;" *and add*—"*Burke* v. *Sams* (L. R., 3 Q. B. 47); *Shrimpton* v. *Sidmouth Railway and Harbour Company* (L. R., 3 C. P. 80); and *Ilfracombe Railway Company* v. *Lord Poltimore* (3 Weekly Notes, 1868, p. 41, H. T. C. P.)."

Page 127, *line* 28, *after* "*Hodsoll* v. *Baxter*," *read*—"but see observations on this case, *post*, p. 330."

Page 138, *note*, *line* 11 *from bottom*, *for* "s. 10," *read* "s. 12."

Page 146, *line* 12, *add*—"This section does not alter the old common law rule that each of several defendants who appears in an action of ejectment is liable for the whole of the plaintiff's costs upon a general verdict for the plaintiff: a defendant can only escape this liability by confessing the plaintiff's title under ss. 204, 205 (*post*, pp. 158, 159) (*Johnson* v. *Mills*, L. R., 3 C. P. 22)."

Page 147, *line* 25, *dele* "*Smith* v. *Tett* (9 Exch. 307)."

Page 170, *line* 11, *for* "*Smith* v. *Felt*," *read* "*Smith* v. *Tett*."

Page 176, *line* 5 *from bottom*, *add*—"*Ganthony* v. *Witan* (2 Weekly Notes, 1867, p. 254, C. P. M. T.)"

Page 206, *line* 3, *add*—"Where a judge has made an order referring an action under this section, the Court will be very reluctant to interfere with his discretion (*Clark* v. *Were*, 3 Weekly Notes, 1868, p. 31, H. T. C. P.)"

Page 211, *line* 30, *for* "of," *read* "or."

Page 214, *line* 12 *from bottom*, *add*—"*contra* if either of the parties object, although he continues to attend, *Ringland* v. *Lowndes*, in Ex. Ch. (17 C. B. N. S. 514; L. J. 33, C. P. 337) and *Davies* v. *Price*, in Ex. Ch. (L. J. 34, Q. B. 8)."

Page 218, *line* 8, *add*—"*Eagle* v. *Charing Cross Railway Company* (L. R., 2 C. P. 638)."

Page 251, *line* 30, *and page* 254, *line* 21, *to* "*Baker* v. *L. & S. W. Railway Company*," *add reference*—"L. R., 3 Q. B. 91."

Page 258, *line* 17 *from bottom*, *to* "*United States of America* v. *M'Rae*," *add*—"affirmed on this point by Chelmsford, C. (L. R., 3 Ch. 79)."

Page 262, *line* 32, *add*—"The rule for attachment against the directors of a railway company was under this section refused, where the order did not specify what officer of the company should make the answer (*Button* v. *S. E. Railway Company*, 3 Weekly Notes, 1868, p. 20, H. T. C. P.)"

Page 267, *line* 35, *add*—"See also *Culverhouse* v. *Wiggin* (3 Weekly Notes, 1868, p. 19, H. T. C. P.; 16 W. R. 402)."

Page 268, *note*, *line* 4 *from bottom*, *to* "*The Jeff Davis*," *add reference*—"(L. R., 2 Ad. & Ecc. 1)."

Page 276, *line* 16 *from bottom*, *add*—"As to injunctions to restrain the wrongful use of trade marks, see the 'Merchandise Marks Act, 1862' (25 & 26 Vict. c. 88, ss. 21, 22)."

Page 281, *line* 2, *add*—"And now by 31 Vict. c. 4, s. 1, 'No purchase made *bonâ fide* and without fraud or unfair dealing, of any reversionary interest in real or personal estate, shall hereafter be opened or set aside merely on the ground of under value.'"

Page 285, *line* 9 *from bottom*, *to* "*Conflans Stone Quarry Company* v. *Parker*, *P. O.*" *add reference*—"(L. R., 3 C. P. 1)."

Page 299, *line* 4, *add*—"but this rule will be relaxed if adequate cause be shown (*Baker* v. *Sayers*, 17 L. T. N. S. 579, B. C. H. T. 1868, *cor.* Blackburn, J.)"

Page 300 *line* 12, *add*—"And such appeals to the court are made; see *Weeks* v. *Wray* (L. R., 3 Q. B. 212); and *Carpenter* v. *Calvert* (17 L. T. N. S. 578, Ex. H. T. 1868)."

Page 315, *line* 14, *for* "69," *read* "66."

Page 323, *lines* 2 *and* 6 *from bottom*, *for* "9," *read* "10."

Page 323, *last line*, *add*—"and it was so held in *Kimbray* v. *Draper* (L. R., 3 Q. B. 160)."

Page 341, *line* 5 *add*—"This section applies where the contract of suretyship was entered into before, and the liability of the surety thereunder occurred after, the act was passed (*In re Cochran's Estate*, L. R., 5 Eq. 209, following *Lockhart* v. *Reilly*, 1 De G. & J. 464; L. J. 27, Ch. 54)."

Page 354, *line* 21, *from bottom*, *add*—"Where the plaintiff after the commencement of the action executed an inspectorship deed, which empowered the inspectors to require an assignment to them of all his property, he was ordered to give security for costs (*Smith* v. *Saunders*, 2 Weekly Notes, 1867, p. 154, C. P. E. T.)"

Page 355, *line* 19, *add*—"It has been held that this section applies to actions commenced before the passing of the act (*Kimbray* v. *Draper* (L. R., 3 Q. B. 160)."

Page 362, *note*, *last line*, *add*—"As to commencing actions in the City of London Court, and the County Courts within the Metropolitan district, see section 3."

Page 381, *line* 4 *from bottom*, *add*—"The order to proceed *in formâ pauperis* takes effect from the time of its service only (*Fray* v. *Voules*, L. R., 3 Q. B. 214)."

Page 392, *line* 11, *from bottom*, *add*—"See also *Weeks* v. *Wray* (L. R., 3 Q. B. 212)."

THE

COMMON LAW PROCEDURE ACTS

OF

1852, 1854 AND 1860.

INTRODUCTION.

THE COMMON LAW PROCEDURE ACTS of 1852, 1854 and 1860 are respectively founded on the first, second and third Reports of the Commissioners appointed, in 1850, to inquire into the Process, Practice and System of Pleading of the Superior Courts of Law at Westminster.

For a long time previously, it was loudly asserted that the proceedings of these Courts were unnecessarily tedious and costly. It was also a subject of deep and general dissatisfaction that the time of the Judges was constantly occupied by frivolous arguments and discussions upon points of merely technical interest, and altogether irrelevant to the merits of the case. Justice was frequently defeated at the trial of a cause, by reason of variances being discovered between the Pleadings and the Evidence; or from objections being taken to the stamps upon documents; or from the want of authority in the Judge to adjourn the trial, when an unforeseen difficulty presented itself; or from other circumstances, which, occasionally after great trouble and expense had been incurred, rendered the trial wholly fruitless to the litigants, and left the question in controversy between them still undecided.

In their first Report, which was presented in 1851, the

Commissioners accordingly discussed all the ordinary steps in an action, from the issue of the writ to final judgment of the Court of Appeal. They directed attention, as they proceeded, to the defects of procedure, the abuses of pleading, and the numberless unnecessary formalities, which pervaded every suit; and they recommended the adoption of a simple and uniform process for commencing actions, a return to the ancient system of pleading, and the abolition of all the technicalities and fictions which had previously exposed the suitor to risk and expense.

On that Report was framed the Common Law Procedure Act of 1852, which was followed by two sets of Rules issued by the Judges in 1853 (R. G., H. T. 1853, *post*, p. 347; and Pl. R., T. T. 1853, *post*, p. 426).

The alterations introduced by this Statute were as sweeping as they have proved to be effectual.

Writ of Summons.

The form of the writ of summons, by which personal actions had, since the statute 2 Will. IV. c. 39, been commenced, was simplified, so as to avoid the statement in it of the nature or subject-matter of the action, a requirement which had been found in practice to be utterly useless, but at the same time to lead to captious objections and to much fruitless expense and delay. The ancient practice of issuing *alias* and *pluries* writs was abolished; and means were provided for renewing those writs which could not be served within the time allowed for that purpose, instead of the old dilatory and expensive process of *distringas* to compel an appearance; and thus the plaintiff was enabled to proceed with his action, on satisfying a judge that reasonable efforts had been made to effect service, so that the writ must have come to the knowledge of the defendant. Outlawry on *mesne* process was at the same time abolished; and the plaintiff was enabled, if the defendant did not enter an appearance to the action, to proceed at once to judgment and execution.

The enactments of the statute of 1852 applied only to *personal* actions and ejectment. When all *real* and *mixed*

actions except dower, right of dower and *quare impedit* were abolished by the statute 3 & 4 Will. 4, c. 27, these three were left to be commenced, as they always had been, by *original writ*, issuing under the great seal out of Chancery. This involved delay and expense, besides giving rise to needless questions of form; and as there seemed to be no reason why the proceedings in real actions should differ in this respect from those in ordinary cases, the Commissioners recommended that dower, right of dower and *quare impedit* should be commenced by writ issuing out of the Court of Common Pleas (that being the Court which alone had jurisdiction in these actions between subject and subject); that all process therein should be tested either in or out of term, and be returnable immediately after execution; and generally that the proceedings in such suits should be assimilated to those in personal actions (*Third Report*, p. 7).

To this recommendation the legislature has given effect. No writ of right of dower, or writ of dower *unde nihil habet*, and no plaint for freebench or dower in the nature of any such writ, and no *quare impedit*, can henceforth be brought in any Court whatsoever; but where any such action would now lie, it may be commenced by a writ of summons issuing out of the Common Pleas, in the same manner and form as the writ of summons in an ordinary action; the service of the writ, appearance of the defendant, proceedings in default of appearance, pleadings, judgments, execution, and all other proceedings being the same, as nearly as may be, as those in ordinary cases.

Appearance.

All actions in the Superior Courts of Common Law (with an exception to be mentioned hereafter) must now therefore be commenced by writ of summons. To the proceedings in all of them, the enactments of the statutes of 1852, 1854, and 1860 apply.

Nonjoinder and Misjoinder of Parties.

After effecting these reforms in respect of process and

appearance, the statute of 1852 provided a summary mode of rectifying the nonjoinder or misjoinder of parties to actions.

It had hitherto been a strict rule of law, that an action should be brought only in the name of the person or persons in whom the right to sue is legally vested. Accordingly in actions founded on *contract*, the omission of a co-plaintiff, or the joinder of one who ought not to have been joined, was equally fatal. In actions arising from *torts* or wrongs, the joinder of a party who ought not to be a plaintiff, was formerly fatal; the nonjoinder of a co-plaintiff could only be taken advantage of by a plea in abatement.

It is evident on the other hand, that, on legal principles, the joinder of a defendant in an action of contract who ought not to be joined should, unless remedied, be fatal; whilst the omission of a defendant who ought to be joined should, as was always the case, only be taken advantage of by a plea in abatement. While in actions arising from torts the joinder of persons not liable as defendants is of no consequence, as the person improperly joined will be entitled to an acquittal; the nonjoinder of persons jointly liable is equally unimportant, as there is no contribution among wrong-doers.

Such being the state of law, the statute of 1852 allowed the misjoinder or nonjoinder of a plaintiff to be amended at any time in the course of the proceedings, and also at the trial, if it appears to the judge that injustice will not be done by so doing; the omitted party consenting to be joined as a co-plaintiff; the party whose name is to be struck out also consenting, or appearing to have been so joined without his consent.

The misjoinder or nonjoinder of defendants in actions on contract may also, under the same statute, be amended *before* trial; and the misjoinder of defendants *at* the trial, on the same terms.

But it not unfrequently happens that the right to sue arises in such a manner, that it is doubtful in whom it is vested. In such cases great hardship and difficulty have hitherto been imposed upon the person really interested as plaintiff, who could sue, as we have seen, only in the name

of the person in whom the right was legally vested. The effect was that a mistake as to the proper person to sue involved an expensive defeat, as the result of a judgment by which the right was pronounced to exist, but to be vested in a person not a party to the action; although this person might in fact be a trustee for, or otherwise in the same interest with, the plaintiff, and who would have consented, had the law allowed it, to be joined as a party. It is not likely that parties will ever be joined as plaintiffs in an action who have no interest in the matter; and the Common Law Commissioners accordingly recommended that plaintiffs should be intrusted with the right to bring their actions in the names of all the persons in whom the legal right might be supposed to exist, leaving it to the court to give judgment in favour of the person or persons who might be found to be entitled to recover (*Third Report*, p. 6).

The legislature has given effect to this suggestion by enacting, that, henceforth, the joinder of too many plaintiffs shall not be fatal; and by allowing every action to be brought in the names of all the persons in whom the legal right is supposed to exist. Judgment must of course be given in favour of the plaintiffs by whom the action is brought, or of such one or more of them as shall be held entitled to recover. But the defendant, though unsuccessful, will, nevertheless, be entitled to the costs sustained by him, so far as occasioned by the joining of any person or persons in whose favour judgment is not given, unless it is otherwise ordered by the court or by a judge. Upon the trial, the defendant may also have the benefit of any set-off he has pleaded, by proving either that all the parties named as plaintiffs are indebted to him, notwithstanding that one or more of such plaintiffs was or were improperly joined, or that the plaintiff or plaintiffs who establish his or their right, is or are indebted to him. It is specially provided that no other action shall afterwards be brought against the defendant by any person so joined as plaintiff, in respect of the same cause of action (Com. Law Proc. Act, 1860, ss. 19, 20, 21, *post*, pp. 313, 314).

The old rule, requiring an action to be brought in the

name only of the person in whom the right of action is vested, has thus been abrogated. This reform, which is now effected in all actions, has been in operation since 1852, in the action of ejectment.

Special Case without Pleadings.

The statute of 1852, having provided for the amendment of defects arising from the nonjoinder and misjoinder of parties to actions, next gave the litigants an opportunity of bringing the questions in dispute between them directly before the proper tribunal for their determination. It effected this by enabling them to dispense with pleadings altogether, and to state disputed questions of *fact*, in an issue, for trial by a jury; and disputed questions of *law* in a special case, for the opinion of the court. It also permitted the parties to make a preliminary agreement as to the amount due to the plaintiff, if the suit involved a money demand, and as to the costs of the action, judgment being entered up according to that agreement or otherwise, according to the result of the case. But these provisions have not been as much used as they should have been; that for the trial of disputed facts, perhaps not at all.

Compulsory Reference.

The statute of 1852 did not, however, deal with a large class of cases, in which pleadings are perfectly unnecessary, but in which an agreement between the parties is ordinarily out of the question; namely, those actions, in which arise complicated questions of account, and in which figures and vouchers must be referred to. With such cases a jury is quite unable to grapple; and, when they come on for trial, they are invariably referred to arbitration. In order to get rid of the delay and expense of preparing for a trial, that all who are professionally concerned know can never take place, provisions were inserted in the statute of 1854 enabling the court or a judge, at any time after the issue of the writ, if it be made to appear by either party that the matter in dispute consists, wholly or in part, of matters of mere account,

either to decide such matter in a summary manner, or to order that it be referred, either wholly or in part, to an arbitrator appointed by the parties, or to an officer of the court; the decision of the court or the order of the judge, if the matter should be disposed of summarily by either, or the award or certificate of the referee, being enforceable by the same process as a finding of a jury upon the matter referred.

Arbitration.

While conferring this extensive power on the judges of the superior courts, the legislature introduced in this place several important amendments in the law of arbitration generally. Power was given to the courts to stay proceedings, whenever a person, having agreed that any then existing or future differences should be referred, nevertheless commenced an action in respect of the matters which were to form the subject of arbitration: if one of the parties failed to appoint an arbitator or an umpire, the other was enabled to do so; if arbitrators or umpires refused to act, others might be appointed; the powers of arbitrators and umpires were enlarged; and better provision was made for enforcing their awards.

Pleadings.

If the parties cannot agree on an issue or a special case, and the differences are not made the subject of a reference, there remains but one method of ascertaining the matters really in controversy between them, so that all discussion and inquiry may be avoided on those which are not. To accomplish this object, the plaintiff first states the facts constituting his cause of action; the defendant, in answering, is compelled either to deny the facts alleged by the plaintiff, technically to *traverse*,—or, confessing them, to avoid their effect by asserting fresh facts, that is to say, to *plead in confession and avoidance;* or, still admitting the facts alleged by the plaintiff, to deny the legal effect contended for by him,—in other words, to *demur*. The plaintiff, if the defendant asserts fresh facts, *replies* according to the same rule. So, if necessary, the defendant *rejoins;* and thus the

parties proceed, till some fact is asserted on the one side and denied on the other, or some proposition of law is affirmed on the one side and denied on the other; the questions thus raised being issues either of *fact* or of *law*; each, from its very nature, being kept quite distinct in the process of elimination; and each also from its very nature being referred to the proper tribunal for its determination.

On this system of *pleading*, as ancient as the law of England, and so simple and sound in principle, numerous defects and abuses had nevertheless been engrafted, which, in the opinion of many, went far to destroy its utility. What these were it would be out of place to enumerate here, as they have been effectually swept away by the statute of 1852, and are now only remembered as things of the past.

Equitable Defences.

But while that statute carefully preserved all that was valuable in our system of pleading, it did not attempt to deal in any way with those cases in which courts of law and courts of equity applied different rules of right and wrong to the same subject-matter; the most glaring instance of which occurred when a court of law was obliged to hold untenable a defence which a court of equity considered valid; the former being obliged to give a judgment in favour of a party, which the latter immediately restrained him from enforcing. To these cases the Commissioners drew attention in their second Report, recommending that the common law courts should be empowered to receive equitable defences by way of plea in every case in which the party pleading them would be entitled to relief in equity; and that, in cases where such relief in a court of equity would be conditional or discretionary, the courts of law should have power to give, in a summary way, the same relief against actions pending therein as might be obtained by resorting to Chancery. The legislature has not, however, seen fit as yet to intrust the judges of the courts of law with the jurisdiction that is alone requisite to enable them to do complete justice to their suitors, and to save them the wholly unnecessary and wasteful expense of resorting to

the Courts of Chancery for that relief, which the judges and officers of the Courts of Common Law are fully as competent to afford; but by the statute of 1854 an extensive equitable jurisdiction was nevertheless intrusted to them; the defendant (or plaintiff in replevin) being enabled, in any case in which he would be entitled to relief against a judgment on equitable grounds, to plead the facts which entitle him to such relief by way of defence, and the plaintiff being in like manner enabled to reply the facts which would in equity avoid the plea.

INJUNCTION.

Another branch of equitable jurisdiction which has been doled out to the Courts of Common Law, and which it may be useful to mention in this place, relates to the issue of writs of injunction.

In their second Report, the Commissioners pointed out that the ordinary scope of the remedy afforded by courts of law is to give compensation or redress for injuries which have been actually sustained. These courts in general afford no means for preventing their commission. The courts of equity, on the other hand, by way of injunction, extend their protection not only to equitable rights, but to those also for the actual violation of which damages may be recovered at law. They interfere, in short, in every case in which, if the defendant were suffered to proceed in the commission of the injury, there would be no adequate remedy at law.

There can be no good reason why courts of law should not restrain violations of *legal* rights in the cases in which an injunction might issue for that purpose from a court of equity. And it is accordingly suggested in the Report, that a party injured should not only be entitled to maintain an action, but that he should be permitted to claim the prohibition of a wrongful act commenced or threatened, either separately or together with a claim for damage for any injury he may have already sustained.

Parliament withheld from the Courts of Law the powers with which it was recommended they should be intrusted. The Procedure Act of 1854 only enables a plaintiff in all

cases of breach of contract or other injury, where he is entitled to maintain and has brought an action, to claim an injunction against the repetition or continuance of such breach of contract or other injury, or the committal of any breach of contract or other injury of a like kind, arising out of the same contract, or relating to the same property or right.

"It is necessary therefore, as the law at present stands, "to wait until a wrongful act has actually been commenced, "so that an action for damages may be maintained, before "application can be made for an injunction to a Court of "Common Law, whereas the danger of such an injury is "enough to found the jurisdiction of the Court of Chancery. "This seems unreasonable, when it is considered that the "right threatened to be violated exists at the Common Law, "and that, in case of actual injury, redress is given in a "Common Law Court, and not in the Court of Chancery, "and that, after the wrong has actually commenced, an in-"junction may be obtained in a Common Law Court against "its repetition or continuance, or the committal of an injury "of a like kind; and yet that, in case of threatened and "impending injury to a similar right, it is necessary to "resort to the Court of Chancery." (*Third Report*, p. 1.) The legislature has not acted upon this unanswerable reasoning.* It has, however, on the other hand, enabled the *Courts of Equity* to award damages, and to *assess them by a jury!* (21 & 22 Vict. c. 27.) Parliament has thus, in cases originally of legal cognizance, granted to the Court of Chancery what it has refused to the Courts of Law, namely, that power which every court ought to possess within itself, of administering complete justice within its jurisdiction.

The writ of injunction is to be claimed by indorsement on the writ, and again in the declaration; but it may be applied for at any time after writ *ex parte*, and granted or declined upon such terms as may seem reasonable and just.

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* See also the masterly memorial of the Common Law Commissioners (Cockburn, C. J., Martin, B., and Bramwell, B.) addressed to the Lord Chancellor in answer to some curious observations officiously made upon their 3rd Report by the Vice-Chancellors.

Before leaving the subject of pleading, it may be observed that the defendant in an action on a bond or in *detinue*, and the plaintiff in *replevin* (in answer to an avowry), are by the statute of 1860 enabled to pay money into court, the advantages of which course will be explained under the sections which confer this privilege.

The Bills of Exchange Act, 1855.

The amendments introduced into our system of pleading by the Common Law Procedure Act of 1852 did nothing to prevent frivolous or vexatious defences being set-up and persisted in against a just claim merely for the sake of delay. Every defendant might, and in most cases may still, enter an appearance in any action against him, and plead non-liability, thus compelling the plaintiff to proceed in the ordinary course to trial, verdict, judgment and execution. The extent to which this system of *false* pleading was carried in the case of Bills of Exchange and Promissory Notes led to complaints by the class of persons who are ordinarily holders of bills, and who loudly contended that they ought to be constituted a privileged class of creditors, and were so fortunate as to get their claim admitted. "The Bills of Exchange Act, 1855" (known as *Sir H. S. Keating's Act*), was accordingly passed; and its chief feature is, that the defendant, in an action brought under that statute, which is commenced by a writ in a form peculiar to itself, must obtain the leave of a judge to appear before he can be allowed to do so. This leave he can only obtain by paying the amount claimed into court, or by setting out the nature of his defence in an affidavit, so that the judge may form an opinion not only as to its validity in point of law, but also as to its *bona fides* in point of fact. Where leave is refused there can be no pleading, and judgment follows as in the case of default of appearance.

Joinder of Actions.

Connected with the subject of pleading, one other amendment effected by the statute of 1852 may be mentioned, that relating to the joinder of different causes of action.

The forms of action hitherto in general use, and still recognized under the provisions of various acts of parliament, especially the Statutes of Limitations, are,—Assumpsit, Debt, Covenant, Detinue, Trespass, and Case.

It was a strict rule of law that no two of these forms should be joined in one action (except that debt might be joined with detinue, and case with trover), so that a claim against a tenant for breach of a covenant to repair in a lease under seal, and a further claim against him for non-repair of another house let by agreement not under seal, must have formed the subject of two actions, one of *covenant* and the other of *assumpsit*. Illustrations of the operation of the rule might easily be multiplied.

It was unreasonable that a plaintiff should be compelled to bring two actions, when the different causes of complaint might, without inconvenience, be combined in one proceeding, as when he had one claim on a bond and another on a bill of exchange, or sought redress for slander and assault against the same person. The rule was therefore altered in 1852, and, except in real actions, and actions begun by writ of summons issued under the Bills of Exchange Act, a plaintiff may now join in one and the same action all his causes of complaint. To prevent any inconvenience which, in particular cases, might ensue from a joint trial of several causes of action, the court has power to prevent the trial of different causes of action together, if such trial would be inexpedient; and in such cases to direct separate trials. Replevin and ejectment, however, cannot be joined together, nor with any other form of action.

Jury Process.

Having provided one uniform process for commencing personal actions, and having restored our system of pleading to its ancient simplicity, the statute of 1852, upon which, it may be observed in passing, all succeeding improvements are to be grafted, next dealt with the procedure of the courts preliminary to trial. It abolished some needless formalities connected with the entry of causes for trial, substituted for writs of *distringas* and *habeas corpora juratorum* a simple

precept directing the attendance of the jury; and provided an inexpensive method of obtaining a special jury, by notice to the sheriff. None of these amendments call for any special remark. We come, therefore, at once to the important alterations introduced by the statute of 1854, with reference to the trial of causes generally.

Trial.

In their Second Report, the Commissioners expressed their opinion, that, in a large class of cases, the intervention of a jury, from its inability to deal effectively with them, was unnecessary, and, in other cases, mischievous. Under the first head may be classed those cases, in which the question turns on the legal effect of evidence or of undisputed facts, and in which the verdict of the jury necessarily depends on the direction of the judge. Within the second category falls those cases which, when brought before the jury, it is found necessary to submit to arbitration; and these, as we have already seen, the statute of 1854 enables the judges to refer, on the application of either party, at any time after the issue of the writ.

With regard to that class of cases, in which the jury may advantageously be dispensed with, the Commissioners very properly hesitated to recommend that trial by jury should be superseded, except in cases of mere account, unless the parties themselves preferred that their cause should be tried by a judge alone; and the legislature has adopted this suggestion.

Trial by a Judge without a Jury.

Trial by jury, accordingly, continues to be the rule; but the jury may in some cases be dispensed with by the parties, who may leave the decision of any issue of fact to the court, or to a judge, provided the court or a judge, in their or his discretion, think fit to allow them to do so. If allowed, the issues of fact may then be tried and determined, and damages assessed where necessary, by any judge who might otherwise have presided at the trial thereof by a jury. The proceedings upon and after the trial are the same as in the

case of a trial by jury; the verdict of the judge being of the same effect as the verdict of a jury, but differing from it in one respect, viz., that it cannot be questioned on the ground of being against the weight of the evidence.

The first innovation, therefore, is the substitution which is now permitted, of a trial by a *judge*, instead of a trial by *jury*. The second relates to the proceedings at the trial itself.

Speeches of Counsel.

Formerly, on the trial of issues of fact, the party on whom lay the burden of making out the affirmative, stated the case to the jury, and then adduced evidence in support of it. The opposite party next addressed the jury; and then called his evidence, if he had any; in which case the counsel for the party who commenced had the right of replying generally on the whole case. The party who began had thus the first word, and, if any evidence was called by the other side, he had also the last. Now it often happens, that evidence does not turn out as previously anticipated; new facts come out, or really unexceptionable witnesses are damaged in cross-examination. The case may be not less good, the witnesses not less entitled to credit, if an opportunity be afforded for explanation; but until the practice in this respect was altered, no summing up of evidence was allowed; and as the Commissioners pointed out (*Second Report*, p. 9), "after the case of the party who began was closed, the "party who came second might, without calling witnesses "who could afford further information, rely upon the adroit-"ness of his counsel, and take, unchecked by the fear of a "reply, advantage of every discrepancy between the state-"ment and the proof, of every ground for assailing the "character and veracity of the witnesses, and frequently "produced an impression inconsistent with the justice of "the case, and which the observations of the judge did not "always succeed in removing." The inconvenience and injustice of this system had long been felt and complained of, and becoming, if possible, more grievous, when the parties to a suit became competent witnesses, the practice

was at last altered by the statute of 1854, which permits the party who begins, in the event of his opponent not announcing at the close of the case of the party who begins, his intention to adduce evidence, to address the jury a second time for the purpose of summing up his evidence. The other party is in like manner allowed to open his case, and to sum up his evidence (if any); the right of replying being the same as formerly.

Adjournment of Trial.

The third alteration in the practice at Nisi Prius, introduced by the statute of 1854, is the removal of one great disadvantage that was previously attendant on a trial by jury; viz., the necessity of proceeding continuously with it till a verdict was given, although circumstances occurred which rendered an adjournment desirable. A party may be taken by surprise by his opponent's case, or a witness or a document may quite unexpectedly become necessary, and not be forthcoming. In such a case he was formerly obliged to submit to a nonsuit, or a verdict against him, as the case might be, although a new trial would afterwards be granted almost as a matter of course; and thus unnecessary expense and delay was often incurred, when an adjournment for a few hours' time would have enabled the deficient matter to be supplied. This has been remedied, the judge having now power at the trial of any cause to order, when he may deem it right for the purposes of justice, an adjournment for such time, and subject to such terms and conditions as to costs and otherwise, as he may think fit.

Evidence.

Closely connected with the subject of trial, is that of *evidence;* and as the enactments of the Common Law Procedure Act of 1854, effect most important alterations in the rules relating to the examination of witnesses, and extend, by the express provision of the statute, to *every court of civil judicature in England*, they are very fully discussed in the notes appended to the statute itself.

Discovery.

A similar method of examination is pursued with reference to the auxiliary power to compel discovery, in aid of an action or defence at law; which, until 1854, was only to be had by the tedious and costly process of a bill in Chancery; but since the Procedure Act of that year has been promptly and inexpensively obtained at Judges' Chambers.

Proceedings after Trial.

The jury are bound, on a question compounded of law and fact, to take the law from the judge; but if unable to come to a satisfactory conclusion, they may find the facts in a *special verdict*, leaving the application of the law to be made by the court. Upon the judgment of the court on a special verdict, error could always be brought, because the error appeared upon the record.

Another course which was sometimes resorted to when the facts were agreed upon, was to allow a verdict to be found for the plaintiff, subject to a *special case*, a mode of proceeding found so convenient in practice that the 3 & 4 Will. 4, c. 42, s. 25, enabled the parties to state a special case immediately after issue joined, and the Procedure Act of 1852, after writ issued. Until the statute of 1854, however, the judgment of the court on a special case, unlike the judgment on a special verdict, could not be taken to a Court of Error, because no error appeared on the record; and this, notwithstanding it was only in disputes of some moment, and upon questions of legal difficulty, that a special case was ever resorted to. A special case is now on the same footing as a special verdict, except where the parties agree to be bound by the decision of the court, and special verdicts with their technical difficulties are happily becoming obsolete.

The facts of the case being ascertained, the judge frequently directs a nonsuit or a verdict; and, with a view of avoiding a new trial, reserves leave to the party against whom he has ruled, to move the court to set aside the non-

suit or the verdict, as the case may be, and to enter a verdict or nonsuit in his favour.

In the event of the improper rejection or admission of evidence, or of erroneous direction in point of law, the party whose evidence is rejected, or who objects to the admission of the evidence received by the judge, or to his direction in point of law, may either tender a bill of exceptions at the trial, or afterwards apply for a new trial. One difference between the proceeding by a bill of exceptions, and that by a motion for a new trial, is, that, upon a bill of exceptions, the appeal is at once to the Court of Error, the court out of which the record issued being entirely passed over; while on a motion for a new trial, the application is to the court of original jurisdiction. But, as in the latter case, as well as in that of a special case already referred to, no error appears on the record, the decision of the court on a motion to enter a verdict or nonsuit, or for a new trial, was formerly final; and thus, although the most important and difficult questions of law are frequently raised upon such motions, the result was, that, if the court erroneously upheld the ruling of the judge at the trial, the losing party was without redress. This has also been remedied by the statute of 1854; and now when leave has been reserved to move to enter a verdict or nonsuit, and the rule to show cause is refused, or if granted is then discharged or made absolute, the party decided against may appeal; and in like manner, on a motion for a new trial, the unsuccessful party may appeal, provided any one of the judges dissent from the rule being refused, or, when granted, being discharged or made absolute, as the case may be, or, provided the court in its discretion think fit that an appeal should be allowed.

Bills of Exception are in consequence now but seldom resorted to.

On the verdict or nonsuit, sooner or later follows the

JUDGMENT;

but, except in providing that, in all actions for debts or liquidated demands, the judgment should be final in the first instance, and not interlocutory; and that where the plaintiff

recovers a sum of money, the amount shall be awarded to him without any distinctions as to the sum recovered being a debt or damages: the statute of 1852 made no alterations of any importance in the practice of the courts.

It abolished however the rule to compute; and, in cases where damages are substantially a matter of calculation, authorized, in lieu of a writ of inquiry, a reference to the master to assess them.

The statute, however, greatly improved the procedure for the

Revival of Judgments.

Formerly, when a writ of execution was not issued within a year and a day after judgment, the judgment was presumed to be satisfied, and it became necessary to revive it by writ of *scire facias*, which was directed to the sheriff of the county in which the venue of the action had been laid, and by him served on the defendant. If the defendant appeared, proceedings took place, to determine whether or not he remained liable; if he did not appear, judgment might be signed. A similar proceeding was resorted to, where, between judgment and execution, there had been a change, by death or otherwise, of the parties by or against whom execution was to be issued.

This was a tedious form, in cases where the fact to be established was of so simple a character that it might be decided without the expense and delay of a regular action. In *scire facias*, too, the writ was directed to the sheriff, and not to the party whose appearance was required, and was tested and returnable in term; so that if a judgment creditor died on the 16th of June, his representative was unable to compel the judgment debtor to answer a *scire facias* before November following, although the only fact to be established, to entitle the representative to execution, was the probate of the will, or letters of administration of the effects of the deceased, documents which prove themselves by mere production in any court. A simple method of proceeding was accordingly provided; and, by analogy to the Statute of Limitations, six years was made the period within which execution may issue upon a judgment without revival.

When revival is necessary, the party alleging himself to be entitled to execution, may either sue out a "writ of revivor," or apply for leave to enter a suggestion upon the roll, and to issue execution thereupon. If the suggestion is allowed, execution may issue; otherwise the party must proceed by writ of revivor, or action upon the judgment.

If he proceeds by writ, it is to be directed to the party, and he is called upon to show cause why execution should not be awarded against him; it is to be tested on the day of its issuing, may be served in any county, and may be otherwise proceeded upon as a writ of summons in an ordinary action.

Abatement of Actions.

The proceedings by writ of revivor are applicable to those cases, in which, by reason either of lapse of time, or of a change by death or otherwise, of the parties entitled or liable to execution, it becomes necessary to revive a judgment.

The statute of 1852 also provided for those cases in which writs would otherwise abate, by the death, marriage, or bankruptcy of one of the parties to the action. It gave to a surviving plaintiff, or to the representative of a deceased plaintiff, a short and simple mode of continuing the action, by entering on the record a suggestion of the death, leaving the truth thereof, if disputed, to be determined at the trial; and it gave to all plaintiffs an equally simple mode of having the legal representative of a deceased defendant put exactly in the place of the deceased, in the action.

By some omission, no means were afforded to a surviving defendant, or to the representative of a sole defendant who had died, of compelling the plaintiff in an action to proceed therein, so as to bring the proceedings to a close. This was supplied by the statute of 1854, which enables the person against whom the action may be continued, to call upon the plaintiff, or the person entitled to proceed in his room, to go on with the action; otherwise the defendant, or person against whom the action may be continued, is entitled to enter a suggestion of the default, and to have judgment for the costs of the action, and of the suggestion, against the

plaintiff, or person entitled to proceed in his room, as the case may be.

The statute of 1852 did not attempt to deal with the great question of

COSTS;

which have formed the subject of one unbroken series of enactments from the Statute of Gloucester, passed in the reign of Edward the First, down to the Common Law Procedure Act of 1860. The statute of 1852 enabled the successful parties, in every case of execution, to levy the costs thereof over and above the sum for which the writ is issued. The act of 1860 extends this principle to the writs of mandamus and injunction, which were first granted by the statute of 1854.

The legislation relating to this fertile object of contention was so complex and confused thirty years ago, that the then Common Law Commissioners recommended that this branch of the law should be rendered intelligible, by being consolidated and comprised within a single act of parliament. This not having yet been accomplished, the Commissioners of the present day repeat the suggestion of their predecessors.* But the legislature has not seen fit to adopt the more important of the recommendations of the Commissioners upon this subject, and merely a slight alteration was effected in the law of costs by the statute of 1860. The provisions of that act, however, have recently made way for the more sweeping change introduced by the County Courts Act, 1867, s. 5 (*post*, p. 323); this last section deprives all plaintiffs of costs who do not recover more than twenty pounds in an action of contract, or ten pounds in one of tort, or who do not obtain a judge's certificate for costs.

It may seem desirable before touching the subjects of "Error" and "Execution," to refer briefly to the enactments of the statute of 1860 with reference to

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* See page 323, *post*.

EJECTMENT.*

The Common Law Procedure Act, 1852, abolished the ancient action of trespass and ejectment, in which John Doe complained of the doings of Richard Roe, and it supplied in its place a new and more simple mode of trying the title to real estate. It provided, however, that the effect of a judgment in the new action should be the same as the effect of a judgment in the old. If John Doe was nonsuited, or there was a verdict for the defendant, the effect was either that Doe did not follow out his then action, or that the defendant had not been guilty of the particular trespass alleged to have been committed on Doe. In consequence Doe might immediately bring another action of trespass and ejectment, complaining apparently of another assault and ejectment, but, in reality, to try the very same title. The courts, however, interfered, and as a matter of course stayed the proceedings in the second action until the costs incurred in the former had been paid. As the effect of a judgment, in the new action of ejectment, is the same as that in the former action, a second action may still be brought in the same way as before. But the courts in pursuance of a recommendation in the Second Report, are expressly enabled by the statute of 1854 to order the plaintiff to give the defendant *security* for the payment of his costs in any such second action, and that all further proceedings in the cause be stayed until such *security* be given.

The statute of 1860 also contains some very important provisions with reference to ejectment upon forfeitures, the effect of which will be better considered in the notes to its different sections. It may therefore be sufficient to add here

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* The proceedings in the old action of ejectment have long furnished a butt for the small wit of laymen, and of ill-instructed lawyers; but to those who have studied the history of our Common Law, and have watched its development step by step with the necessities of the great people whose liberties it has fostered and guarded, the sweeping away of ancient landmarks and evidences—not mere corruptions or abuses—is not a source of unalloyed gratification.

that the jurisdiction first conferred on the Superior Courts of Common Law by 4 Geo. 2, c. 28, enabling them to relieve against forfeitures, has now been extended to every case of ejectment for a forfeiture brought for *non-payment of rent*, or for breach of a *covenant to insure*. This jurisdiction is to be exercised in all respects, as to payment of rent, costs, and otherwise, as in the Court of Chancery, which has hitherto had an almost exclusive right to relieve. The relief may be given in the first instance by a judge, but his order is liable to be discharged, varied, or set aside by the court, and the judgment of the court itself is in this case subject to appeal, like any other judgment within its ordinary jurisdiction.

PROCEEDINGS IN ERROR

are now regulated by the Procedure Act of 1852. By that statute, the Writ of Error, which issued out of Chancery, and was practically the commencement of a new suit, is abolished, and "error" made a step in the cause. It must now be brought within *six* and not twenty years as formerly; and is brought by simply delivering a memorandum of error to the master, and a copy of his note acknowledging the receipt to the defendant in error, a simple suggestion of error being next put upon the roll, which is afterwards carried into the Court of Error by the master. The statute enlarges the powers of the Court of Error, so as to get rid of some defects which formerly affected their procedure, and provides against the abatement of the action by enabling suggestions to be entered as in the cases already referred to.

There remains but one other branch of procedure dealt with by the statute of 1852, namely,

EXECUTION,

which in ordinary cases (that is to say where money, whether debt or damages, is recovered) is either by *fieri facias*, *sequestrari facias*, *capias ad satisfaciendum*, or

elegit. There are two other writs of execution, *levari facias*, which is altogether obsolete, and *extent*, a mode of proceeding appropriated to the Crown, and to Crown debtors. The statute of 1852 abolished the *ground* writs, which ought to have been, but in practice never were, issued into the county where the venue was laid, before the *real* execution was resorted to; permitted writs to be issued directly to the sheriffs of the counties Palatine, and not, as previously, to the Chancellor, to be by him sent to the sheriffs; limited the duration of all writs to one year; and allowed the expenses of the execution to be levied under the writ itself.

Under a writ of *fieri facias*, the goods and chattels, money and securities of the execution debtor may be taken; but only specific coin or bank notes, and debts secured by cheques, bills, promissory notes, bonds, specialties, and the like. Stock in the funds, or shares in companies, cannot be reached by this writ; but by the 1 & 2 Vict. c. 110, s. 12, this kind of property can be charged by order of a judge; and the judgment creditor may, at the end of six months, *by proceeding in equity!* proceed to realize his debt. By the 27 & 28 Vict. c. 112, s. 4 (*post*, p. 506), a somewhat similar power is given to a judgment creditor who has taken his debtor's lands under a writ of *elegit*.

The Procedure Act of 1854 has extended the remedies of the creditor against the property of his debtor, by enabling the former, after judgment, to attach debts and monies of his debtor in the hands of a third person, and in this way to obtain satisfaction of his judgment. It also enables the judgment creditor to have the supposed debtor, who is called the garnishee, orally examined as to whether any and what debts are owing to the judgment debtor, and to obtain the production of books and documents; affording the garnishee at the same time an opportunity of disputing his liability, and in such case throwing the *onus* of proof on the judgment creditor.

In their Third Report (p. 7), the Commissioners suggested several amendments with reference to this process of execution. They proposed that a judge, when applied to for an order of attachment, "should have a discretion to refuse to

"interfere in cases where the costs of the proceedings "would, in his opinion, bear so large a proportion to the "amount to be recovered as to make the remedy practically "worthless or vexatious;" and this suggestion has been adopted.

"It occasionally happens, again, that the garnishee ap- "pears, admits the debt, is willing to pay it, but has a *bonâ* "*fide* doubt whether the execution debtor is really entitled "to it and whether some other person is not. Now it is "obvious that garnishees ought not to be compelled to pay "without being protected against that other person, and "that the latter ought not to have his rights decided on "without having an opportunity of being heard on them." To prevent these inconveniences the remedy suggested was to enable the garnishee, on being served with the order, to take out a summons, in the nature of an interpleader, calling on any person to whom he suggests the debt is really due, to appear; on which proceedings might then take place as in interpleader, and the creditor, or the person called on, be barred according to the result. This suggestion has been adopted, in spirit though not in terms, by enabling the judge to direct the appearance of third persons, and thereupon to make such order as shall be just and reasonable.

In the action of *detinue*, the plaintiff in form recovers the specific chattels sued for, or their value; but until the law was altered by the statute of 1854, the defendant had it in his power to keep the chattels upon paying the value as assessed by the jury. A special writ of execution has been framed to give effect to the right of the plaintiff to have the specific chattel restored to him.

Of a somewhat similar nature is the writ of execution, which by the Mercantile Law Amendment Act, 1856, may be awarded in actions for breach of an agreement to deliver specific goods to a purchaser,—the nearest approach perhaps which the Common Law Courts have yet been allowed to make towards enforcing that specific performance of con-

tracts, which constitutes so large a branch of the jurisdiction of the Courts of Equity; but even this power so given appears never yet to have been acted on.

The statute of 1854, it is true, enables the plaintiff to claim, in certain cases, a writ of *mandamus*, the professed object of which was to give him the means of obtaining a specific performance by the defendant. But the straitened terms in which the power has been conferred by the legislature, and the very diffident and modest interpretation put upon it by the courts have so limited its application, that the Court of Chancery practically retains its jealously-guarded monopoly of jurisdiction.

Finally, it may be observed that obedience to writs of Injunction and Mandamus,* may in certain cases be enforced by the issue of writs of *Sequestration*, a process of execution the use of which had hitherto been confined to the Courts of Equity.

INTERPLEADER,

arising as it ordinarily does out of disputed claims to goods seized in execution, would here seem to claim attention; but that its importance and intricacy requires such detailed treatment, as can only be given to it in its appropriate place hereafter, where the statutes and cases are succinctly collected.

This brief review of the enactments of the important statutes, by which the practice of the Superior Courts of Law is now chiefly regulated, has been attempted with the view of displaying to the reader the field over which the changes effected by the three Common Law Procedure Acts extend. To the details of the several statutes, and their practical application, the greater part of the remainder of this book is devoted.

The legislature has not seen fit to adopt the most important and most valuable of the suggestions contained in the Second

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* But see page 321, *post*.

and Third Reports of the Common Law Commissioners, who have now brought their labours to a close. Most of the changes that have been effected at their instance were indeed recommended by their predecessors in the commission of 1831; but they have the merit of carrying them into effect.

When the *fusion of Law and Equity* has been completed to the extent so powerfully recommended by the very learned Commissioners, there would seem but little defect left in our Common Law Procedure to serve as an opportunity for those self-constituted amenders, who so noisily busy themselves about altering the Common Law, the principles of which many of them might, with certainly less risk to the community, if not with more profit to themselves, be employed in learning.

This Introduction cannot be better brought to an end than by again quoting from the Common Law Commissioners' (3rd) Report.

"In closing their commission it cannot but be gratifying "to the Commissioners to be able to report that the altera- "tions that have been effected have rendered the procedure "in actions simple, economical, and speedy, and have had the "effect of limiting the costs to the expenses of the necessary "and essential steps in a cause."

"The technicalities which brought so much discredit on "our jurisprudence have now disappeared, and the courts, "owing to the improved system of pleading and procedure, "and the large additional power of amendment, are occupied "in adjudicating upon the substantial merits of the cases in "litigation, while, from the operation of the same causes, it "very rarely occurs in trials at nisi prius that the real ques- "tion in controversy is not decided by the jury."

THE

COMMON LAW PROCEDURE ACT,

15 & 16 Vict. c. 76.

An Act to amend the Process, Practice and Mode of Pleading in the Superior Courts of Common Law at Westminster, and in the Superior Courts of the Counties Palatine of Lancaster and Durham. [30th June, 1852.]

Whereas the process, practice and mode of pleading in the Superior Courts of Common Law at Westminster may be rendered more simple and speedy: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons in this present Parliament assembled, and by the authority of the same, as follows:—

Commencement of act.

1. The provisions of this act shall come into operation on the twenty-fourth day of October, in the year of our Lord one thousand eight hundred and fifty-two.

Writs of Summons.

Writs for commencement of Actions.

And with respect to the writs for the commencement of personal actions in the said courts against defendants, whether in or out of the jurisdiction of the courts, be it enacted as follows:

Personal actions, when defendant resides within jurisdiction, to be commenced by writ of summons in form No. 1. of Schedule (A.)

2. All personal actions brought in her Majesty's Superior Courts of Common Law, where the defendant is residing or supposed to reside within the jurisdiction of the said courts, shall be commenced by writ of summons in the form contained in the Schedule (A) to this act annexed, marked No. 1, and in every such writ and copy thereof the place and county of the residence or supposed residence of the party defendant, or wherein the defendant shall be or shall be supposed to be, shall be mentioned; and such writ shall be issued by any one of the officers of the said courts

respectively by whom like process hath been heretofore issued from such court, or by such other officer as the court shall direct.

The use of the term *personal* action had the effect of excluding from the operation of this and other sections, actions of right of dower, dower and *quare impedit*, which are *real* actions, and had, until recently, to be commenced by original writ issued out of Chancery, and to be carried on in the Court of Common Pleas. Now, by "The Common Law Procedure Act, 1860," ss. 26 and 27 (which see *post*), no writ of right of dower or writ of dower, and no *quare impedit*, is henceforth to be issued; but such rights as were hitherto enforceable thereunder are now to be proceeded for by a specially indorsed writ of summons, issued out of the Court of Common Pleas, and subject to the general provisions of this act and of the C. L. P. A. 1854.

As to replevin, see s. 41 (*post*, p. 47); and C. L. P. A. 1860, ss. 22, n., *et seq.*, *post*.

The statute prescribes the making of certain indorsements on the writ. These are noticed under ss. 6, 8, and 25 (*post*, pp. 4, 6 and 31).

The writ of summons must be in the above *form*, though the omission to insert in, or indorse on it, any of the matters required to be so inserted or indorsed will not make the writ void, but only subject the plaintiff to have it set aside as irregular, or amended at his cost (s. 20, *post*, p. 28). Under the former practice a writ commanding the defendant to enter an appearance "in our Court of at Westminster" was set aside although it was tested in the name of the Chief Baron (*Stephenson* v. *Thorne*, 2 D. & L. 230).

It issues in the name of the sovereign, whose style and title ought to be strictly followed (*Hall* v. *Redington*, 5 M. & W. 605),

Name of defendant. and is directed to the defendant, whose christian and surname ought to be correctly stated, though he may be addressed by the name which he bears by reputation (*Williams* v. *Bryant*, 5 M. & W. 447). The 3 & 4 Will. 4, c. 42, s. 12, enables parties sued on bills, notes and written instruments to be described in the writ and subsequent proceedings by the initials or contractions used by them in such instruments. A peer or titled person ought to be described by his proper title (*Wells* v. *Lord Suffield*, 5 D. & L. 177). Misnomers may be rectified by an amendment under a judge's order, at the cost of the plaintiff (*Rust* v. *Kennedy*, 7 Dowl. 199).

A corporation should be sued by its corporate name.

Residence of defendant. The place and county of the "residence or supposed residence" of the defendant must be stated. Formerly a correct statement of the residence was of consequence; for a writ could only be served in the county named in it, or within 200 yards of its boundary. This gave rise to numerous applications to set aside the service of writs, the only effect of which was to create delay and expense. The writ may now be served in any county (s. 14, *post*, p. 10); but the omission of the statement of the "place and county" is an irregularity (*Ross* v. *Gandell*, 7 C. B. 766); amendable, however, under s. 20.

Name of plaintiff. The name of the plaintiff is also to be stated; but a writ cannot be set aside for a mere misnomer of the plaintiff (*Walker* v. *Parkins*, 2 D. & L. 298).

Addition and character of party. The addition of neither party is required, nor is it necessary to state whether the parties sue or are sued in a representative

capacity, as executor, administrator or assignee. It is better not to do so (——, *administrator*, v. ——, 1 Dowl. 97, n.) It may be desirable sometimes, however, to show to the defendant, by the writ, either that the plaintiff sues or that he is himself sued *en autre droit*; for instance, to prevent an executor paying another creditor (*Rees* v. *Morgan*, 5 B. & Ad. 1035).

The writ is issued by the court, but it is prepared by the plaintiff or his attorney, who also prepares a *præcipe* for it.

The indorsements being made on the writ according to the ss. 6, 8 and 25, it must be sealed at the office of the court from which it is issued, and the *præcipe* left there. Concurrent writs may be issued (s. 9, *post*, p. 7).

Alteration in writs.

Any alteration in the writ without being resealed before service would render it void (*Siggers* v. *Sansom*, 2 Dowl. 745).

Where a writ was issued by mistake against a defendant in a wrong name, it was held that it might, before service, be corrected and resealed without altering the *teste* (*Gibson* v. *Vorley*, 7 E. & B. 49).

The court has no power to alter the date of a writ of summons wrongly dated by mistake, even to prevent the operation of the Statute of Limitations, unless it be to make the writ accord with the *præcipe*; and appearance to a writ so altered under the order of a judge at chambers has been held no waiver, upon the ground that the writ so amended was void, and not merely irregular (*Clarke* v. *Smith*, 2 H. & N. 753; *Kirk* v. *Dolby*, 6 M. & W. 636).

Memorandum.

The memorandum requires the writ to be served within six calendar months. If not so served, it must be renewed in the mode pointed out by s. 11 (*post*, p. 8). A defendant may appear to a writ after the six months have expired (*Richardson* v. *Daley*, 7 Dowl. 25), and accept service after that period (*Coates* v. *Sandy*, 9 Dowl. 381); or apply to set it aside (*Hemp* v. *Warren*, 2 Dowl. N. S. 758). If the writ did not contain the memorandum formerly required, it could be set aside as irregular (*Day* v. *Holly*, 2 Dowl. N. S. 974). Omissions and irregularities may now be amended under s. 20 (*post*, p. 28).

This section does not apply if the defendant is resident in Scotland or Ireland (*Flower* v. *Allan*, 2 H. & C. 688; L. J. 33, Ex. 83; *Thompson* v. *North British Railway Company*, 42 Law Times, p. 95, Ex., M. T. 1866, on which case, see note at p. 15, *post*), and *vide* s. 18, and note (*post*, p. 16 *et seq.*).

No form or cause of action to be mentioned in writ.

3. It shall not be necessary to mention any form or cause of action in any writ of summons, or in any notice of writ of summons, issued under the authority of this act.

Writ to state names of all defendants, and for only one action.

4. Every writ of summons shall contain the names of all the defendants, and shall not contain the name or names of any defendant or defendants in more actions than one.

If persons are joined as defendants who are not liable as such, the misjoinder may be rectified, under s. 37 (*post*, p. 43), at any time before, and even at the trial; but it is different if too few defendants are sued, for s. 38 (*post*, p. 44) only enables the plaintiff to amend the writ and subsequent proceedings after a plea in abatement for non-joinder; and the courts have decided that they

cannot amend a writ by adding the name of a defendant (*Goodchild* v. *Leadham*, 1 Exch. 707); but under s. 20 (*post*, p. 28), it may be amended by the plaintiff, without any order of the court, if the defendants who have been sued give notice of objection or plead in abatement (ss. 35, 36, *post*, pp. 41—43).

The latter portion of this section does not apply to writs of summons issued under "The Summary Procedure on Bills of Exchange Act, 1855" (*post*).

Writ to be dated of day of issuing, and tested in name of chief or senior judge.

5. Every writ of summons shall bear date on the day on which the same shall be issued, and shall be tested in the name of the Lord Chief Justice or Lord Chief Baron of the court from which the same shall issue, or in case of a vacancy of such office, then in the name of a* senior puisne judge of the said court.

If dated on a different day from that on which it was issued, the writ may be set aside as irregular; but it may be amended in this respect so as to correspond in date with the *præcipe* (*Kirk* v. *Dolby*, 6 M. & W. 636). If it bears no date at all, it is, if not a nullity, at least irregular (*Ball* v. *Hamlet*, 3 Dowl. 188; *Wells* v. *Dawson*, 2 Dowl. N. S. 468). But if dated on a Sunday it is a nullity (*Hanson* v. *Shackleton*, 4 Dowl. 48). The date may be stated in words at length, or in figures (*Eyre* v. *Walsh*, 6 Taunt. 333).

Hill, J., at chambers, refused to set aside a writ whereon the christian name of the Chief Justice was mis-stated (*Folkard* v. *Fitzstubbs*, 1 F. & F. 376).

Writ to be indorsed with name and abode of attorney, or a memorandum that writ has been sued by plaintiff in person.

6. Every writ of summons shall be indorsed with the name and place of abode of the attorney actually suing out the same, and in case such attorney shall not be an attorney of the court in which the same is sued out, then also with the name and place of abode of the attorney of such court in whose name such writ shall be taken out; and when the attorney actually suing out any writ shall sue out the same as agent for an attorney in the country, the name and place of abode of such attorney in the country shall also be indorsed upon the said writ; and in case no attorney shall be employed to issue the writ, then it shall be indorsed with a memorandum expressing that the same has been sued out by the plaintiff in person, mentioning the city, town or parish, and also the name of the hamlet, street and number of the house of such plaintiff's residence, if any such there be.

Address of attorney.

A defendant is entitled to full information as to the person to whom he may address himself for a settlement of the action against him. The information, when the writ is issued out by an attorney, is not required to be so particular as when it is sued out by a plaintiff in person, as an attorney may be more easily found out. "Gray's-Inn, London," has been held sufficient designa-

* *Qy.* "the."

tion of an attorney; "Southampton-buildings," insufficient. Where the writ is sued out by a firm of attorneys, the name of the *firm* ought to be indorsed (*Engleheart* v. *Eyre*, 2 Dowl. 145; *Hartley* v. *Rodenhurst*, 4 Dowl. 748).

Address of plaintiff.

Where the writ is sued out by the plaintiff in person, the directions of the above section ought to be most strictly followed. "No. 1, Clifford's-Inn-passage, Fleet-street, in the city of London," has been held a sufficient address (*Arden* v. *Jones*, 4 Dowl. 120), the words *city*, *town*, *parish*, being used disjunctively; but "W. L., 32, Great J. Street, Bedford-row, agent for the plaintiff in person, who resides at Barmouth," has been considered an insufficient statement (*Lloyd* v. *Jones*, 1 M. & W. 549). The amending of this statement is within s. 20 (*post*, p. 28).

In a case where an attorney sued in person, it was held that he was properly described under this section as of the place where he carried on his business (*Ablett* v. *Basham*, 5 E. & B. 1019). See also decisions on meaning of words "residence," "place of abode," and "dwelling," collected in *Attenborough* v. *Thompson* (2 H. & N. 559); and in *Kerr* v. *Haynes* (L. J. 29, Q. B. 70).

See, as to place of dwelling of a corporation (*Corbett* v. *General Steam Navigation Company*, 4 H. & N. 452; L. J. 28, Ex. 214; *Brown* v. *L. & N. W. Railway Company*, 4 B. & S. 326; L. J. 32, Q. B. 318; *Keynsham Blue Lias Lime Company* v. *Baker*, 2 H. & C. 729; L. J. 33, Ex. 41; *Aberystwith Promenade Pier Company* v. *Cooper*, L. J. 35, Q. B. 44).

See, as to entry of address by plaintiff or defendant suing or defending in person, R. G., H. T. 1853, r. 166, *post*.

Attorney on demand to declare whether writ issued by his authority, and to declare name and abode of his client, if ordered.

7. Every attorney whose name shall be indorsed on any writ issued by authority of this act shall, on demand in writing, made by or on behalf of any defendant, declare forthwith whether such writ has been issued by him or with his authority or privity; and if he shall answer in the affirmative, then he shall also, in case the court or a judge shall so order and direct, declare in writing, within a time to be allowed by such court or judge, the profession, occupation or quality, and place of abode of the plaintiff, on pain of being guilty of a contempt of the court from which such writ shall appear to have been issued; and if such attorney shall declare that the writ was not issued by him, or with his authority or privity, all proceedings upon the same shall be stayed, and no further proceedings shall be taken thereupon without leave of the court or a judge.*

If writ issued without authority of attorney proceedings to be stayed.

This demand ought to be made in an early stage of the proceedings.

*A judge will not in general refuse to order the information to be given although it be sought for a collateral purpose (*Cox* v. *Beckett*, 18 C. B., N. S. 239; L. J. 34, C. P. 125).*

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* *An attorney suing for a corporation must be retained under its common seal (Arnold* v. *Poole*, 2 Dowl. N. S. 574); otherwise he cannot recover his bill of costs.

If the plaintiff's attorney answer in the affirmative, and the defendant desire to know the plaintiff's abode, profession, &c., he should take out a summons at judge's chambers for such particulars.

The information ought to be sufficient, and not illusory. "Peele's Coffee House, Fleet Street," has been held not a sufficient statement of a plaintiff's residence (*Hodgson* v. *Gamble*, 3 Dowl. 174). If the information is insufficient, and its sufficiency must depend on the circumstances of each case, a summons should be taken out for better particulars. It will be for the court or a judge to decide whether the particulars furnished are sufficient, or whether the defendant should apply for an attachment for contempt (*Smith* v. *Bond*, 11 M. & W. 326). Where an attorney refused to comply with a judge's order, the court allowed the defendant to *non pros.* the plaintiff in the action, and ordered the attorney to pay the costs (*Gynn* v. *Kirby*, 1 Str. 402). Where an order omitted to specify the time within which the declaration was to be made; but provided for a stay of proceedings after the lapse of a certain number of days from the making of the order until the declaration should be made, it was held a bad order *under this section*; but it was suggested that if it had been made a rule of court it might have been proceeded upon under the general jurisdiction of the court (*Malpas* v. *Mudd*, 8 H. & N. 246; *sed quære*).

If the attorney declares the writ not to have been issued by him, or with his authority or privity, all proceedings upon the same may be stayed. The defendant, upon making an affidavit of the facts, can obtain an order to stay proceedings.

Indorsement of debt and costs on writ and copy of writ for a debt, with notice that proceedings will be stayed on payment within four days.

8. Upon the writ and copy of any writ served for the payment of any debt the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for the costs of such writ, copy and service, and attendance to receive debt and costs, and it shall be further stated that upon payment thereof within four days to the plaintiff or his attorney, further proceedings will be stayed; which indorsement shall be written or printed in the following form or to the like effect:—

> "The plaintiff claims £ for debt, and £ for costs, and if the amount thereof be paid to the plaintiff or to his attorney within four days from the service hereof further proceedings will be stayed."

But the defendant shall be at liberty, notwithstanding such payment, to have the costs taxed, and if more than one-sixth shall be disallowed, the plaintiff's attorney shall pay the costs of taxation.

The object in requiring this indorsement is, that the defendant may stay the proceedings by paying the amount claimed within four days. It does not limit the plaintiff except for that purpose (*Jacquot* v. *Bourra*, 5 M. & W. 156).

Payment after the four days, to the attorney's clerk who kept

the money, has been held to entitle the defendant to a stay of proceedings (*Hodding* v. *Starchfield*, 7 M. & G. 957).

Indorsement of debt.

The indorsement is to be made on the writ and copy for the payment of a *debt* properly so called; consequently an indorsement is not necessary when the plaintiff claims *damages*, or damages and debt (*Perry* v. *Patchett*, 2 Dowl. 667). Nor is an indorsement required on the writ in an action on a bail bond or replevin bond (*Rowland* v. *Dakeyne*, 2 Dowl. 832; *Smart* v. *Leetl*, 3 Dowl. 34); nor in a *qui tam* action (*Hobbs* v. *Young*, 2 D. & L. 474).

Staying proceedings.

The debt should not be overstated. If it is, the defendant may stay proceedings on payment of the sum really due, and the costs of the writ only (*Elliston* v. *Robinson*, 2 Dowl. 241). To do so he must take out a summons to stay.

If the plaintiff refuse the amount offered, such refusal will be indorsed by the judge on the summons, and if after this he recover no more, he will have to pay the defendant's costs (*Watson* v. *Coleman*, 7 M. & G. 424); but the defendant must pay the amount offered into court (*Clerk* v. *Dann*, 3 Dowl. 513). The acceptor of a bill of exchange, or the maker of a promissory note, may stay proceedings on payment of debt and costs in that action only (R. G., H. T. 1853, r. 24, *post*).

Payment into court.

The defendant may have the costs taxed, though he pay less than the sum indorsed (*Hunter* v. *Russell*, 5 M. & G. 601; but see *Young* v. *Crompton*, 2 D. & L. 557).

Omission of indorsement.

The want of this indorsement is an irregularity (*Truslove* v. *Whitechurch*, 8 Dowl. 837), which may, however, be amended, at the plaintiff's cost (s. 20, *post*, p. 28).

As to special indorsements, see s. 25 (*post*, p. 31).

If a plaintiff in an action for a debt under 20*l.* claims to be entitled to his costs, he should further indorse upon his writ a notice to that effect under R. G., E. T. 1857, *post*.

If the plaintiff intends to apply for a *mandamus* under the 68th, or for an *injunction* under the 79th and 80th sections of "The Common Law Procedure Act, 1854," or if he intends to declare in *debet*, or for *freebench*, or in *quare impedit* under the C. L. P. A. 1854, s. 26, he must indorse his writ according to the provisions of those enactments, which see *post*.

Concurrent writs may be issued.

9. The plaintiff in any such action may, at any time during six months* from the issuing of the original writ of summons, issue one or more concurrent writ or writs, each concurrent writ to bear teste of the same day as the original writ, and to be marked with a seal bearing the word "concurrent," and the date of issuing the concurrent writ; and such seal shall be provided and kept for that purpose at the offices of the masters of the said courts, and shall be impressed upon the writ by the proper officer of the

* In all acts of parliament the word "month" is to be taken to mean calendar month, unless words be added showing lunar month to be intended (13 & 14 Vict. c. 21, s. 4). But in legal proceedings generally a month is four weeks (*Tullet* v. *Linfield*, 3 Burr. 1455; 1 W. Bl. 450; *Soper* v. *Curtis*, 1 Dowl. 237).

As to how calendar months are to be reckoned, see *Freeman* v. *Read* (4 B. & S. 174; L. J. 32, M. C. 228).

court out of which the original writ issued: provided always, that such concurrent writ or writs shall only be in force for the period during which the original writ in such action shall be in force.

A concurrent writ must be issued within six months from the *first* issuing of the original writ. A concurrent writ cannot be issued upon a renewed writ, after the expiration of six months from the issue of the original writ (*Coles* v. *Sherrard*, 11 Exch. 482).

The writs must correspond with each other, and the defendant will only be liable for the costs of the writ with which he is served (*Angus* v. *Coppard*, 3 M. & W. 57).

The concurrent writ will at first be only in force until the expiration of the six months of the currency of the original writ; but as the original writ may, by renewal, be continued in force from six months to six months, it would seem that if it be renewed, the concurrent writ will also continue in force by virtue of that renewal (see s. 11).

From commencement of this act certain provisions of 2 Will. 4, c. 39, repealed.

10. From the time when this act shall commence and take effect, so much of a certain Act of Parliament passed in the second year of the reign of his late Majesty King William the Fourth, intituled "An Act for Uniformity of Process in Personal Actions in His Majesty's Courts of Law at Westminster," as relates to the duration of writs, and to *alias* and *pluries* writs, and to the proceedings necessary for making the first writ in any action available to prevent the operation of any statute whereby the time for the commencement of any action may be limited, shall be repealed, except so far as may be necessary for supporting any writs that have been issued before the commencement of this act, and any proceedings taken or to be taken thereon.

See *Gapp* v. *Robinson* (12 C. B. 828; L. J. 22, C. P. 5).

Renewal of writs of summons to save the Statute of Limitation, and for other purposes.

11. No original writ of summons shall be in force for more than six months from the day of the date thereof, including the day of such date; but if any defendant therein named may not have been served therewith, the original or concurrent writ of summons may be renewed at any time before its expiration, for six months from the date of such renewal, and so from time to time during the currency of the renewed writ, by being marked with a seal, bearing the date of the day, month and year of such renewal, such seal to be provided and kept for that purpose at the offices of the masters of the said Superior Courts, and to be impressed upon the writ by the proper officer of the court out of which such writ issued, upon delivery to him by the plaintiff or his attorney of a *præcipe* in

such form as has heretofore been required to be delivered upon the obtaining of an *alias* writ; and a writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons.

Where the last day for renewal fell on the 29th December (a Sunday), and the writ was therefore taken to the proper office for renewal on the 28th December, when the office was found closed for the Christmas holidays, the court refused to allow the writ to be renewed *nunc pro tunc* (*Evans* v. *Jones*, 2 B. & S. 45: S. C., *sub nom. Anon.* L. J. 31, Q. B. 61). In *Anon.* (L. J. 24, Q. B. 23), Crompton, J., in the Bail Court, held, that when the last day of the six months so reckoned as to include the day of the previous renewal was a *Sunday*, the renewal should have been made on the previous day.

As to the effect of the offices being closed on the last day for taking any step in a cause, &c., *vide* R. G., H. T. 1853, r. 174, n., *post*.

The Court of Queen's Bench after consultation with the judges of the other courts held, that they had no jurisdiction to allow a renewal *nunc pro tunc* where the omission to renew in due time was the omission of the plaintiff's attorney, and there had been no default on the part of the officer of the court (*Naser* v. *Wade*, 1 B. & S. 728; L. J. 31, Q. B. 5).

It is now settled that the six months during which the renewed writ continues in force are to be reckoned inclusive of the day of renewal (*Anonymous*, 1 H. & C. 664; L. J. 32, Ex. 88; *Fisher* v. *Cox*, 43 Law Times, p. 15, Q. B., E. T. 1867. *L. T. N. S.*).

In the former cases of *Black* v. *Green* (15 C. B. 262; S. C., *sub nom. Anon.* L. J. 24, C. P. 1); and *Anon.* (L. J. 24, Q. B. 23), where the officer had refused to renew the writs when presented to him for that purpose on the day following the expiration of the six months, the court ordered the writ to be stamped as of that day, without expressing any opinion as to the validity of the writs so renewed. Where a judge, after the expiration of the time limited by this section, makes an *ex parte* order for the renewal of a writ *nunc pro tunc*, the plaintiff, in order to maintain the validity of such renewed writ, must prove to the court that such order was rightly made (*Fisher* v. *Cox*, *ubi supra*, *ex rel.* ea.).

A defendant who has been served after the six months should not treat the writ as a nullity, but should apply to set it aside (*Hemp* v. *Warren*, 2 Dowl. N. S. 758).

In order to renew the writ, a renewal *præcipe* must be made out.

The writ will be resealed with a "renewal" seal, in the same way as when originally sealed, on delivery of the *præcipe* to the officer (p. 3, *ante*).

The renewed writ will itself require renewal, if the defendant is not served within six calendar months from the date of renewal.

Renewal of writs issued before this act.

12. Where any writ of summons in any such action shall have been issued before, and shall be in force at the commencement of this act, such writ may at any

time before the expiration thereof be renewed under the provisions of and in the manner directed by this act; and where any writ, issued in continuation of a preceding writ, according to the provisions of the said act of his late Majesty King William the Fourth, shall be in force and unexpired, or where one month next after the expiration thereof shall not have elapsed at the commencement of this act, such continuing writ may, without being returned *non est inventus*, or entered of record according to the provisions of the said act of his late Majesty King William the Fourth, be filed in the office of the court within one month next after the expiration of such writ, or within twenty days after the commencement of this act; and the original writ of summons in such action may thereupon, but within the same period of one month next after the expiration of the continuing writ, or within twenty days after the commencement of this act, be renewed under the provisions of and in the manner directed by this act; and every such writ shall, after such renewal, have the same duration and effect for all purposes, and shall, if necessary, be subsequently renewed in the same manner as if it had originally issued under the authority of this act.

See *Gapp* v. *Robinson* (s. 10, n., *ante*, p. 8).

Production of renewed writ evidence of commencement of action.

13. The production of a writ of summons purporting to be marked with the seal of the court, showing the same to have been renewed according to this act, shall be sufficient evidence of its having been so renewed, and of the commencement of the action as of the first date of such renewed writ for all purposes.

See *Fisher* v. *Cox* (s. 11, n., *ante*, p. 9).

Service of Writs.

Writ may be served in any county.

14. The writ of summons in any action may be served in any county.

Indorsement of service to be made.

15. The person serving the writ of summons shall and he is hereby required, within three days at least after such service, to indorse on the writ the day of the month and week of the service thereof, otherwise the plaintiff shall not be at liberty, in case of non-appearance, to proceed under this act; and every affidavit of service of such writ shall mention the day on which such indorsement was made.

This indorsement may be signed by a marksman, but service should not be effected by a marksman (*Baker* v. *Coghlan*, 7 C. B. 131).

The affidavit may be sworn before a judge or a commissioner for taking affidavits. It cannot be made before the plaintiff's attorney or his clerk, nor before the attorney in the country if his agent in town is the attorney on the record (R. G., H. T. 1853, rr. 142, 143, *post*; *In re Gray*, L. J. 21, Q. B. 380).

The affidavit should show that the writ and indorsements are regular (*Wakeley* v. *Teesdale*, 2 L. M. & P. 85), and a copy of the writ should be annexed.

A mere process server is not ordinarily liable in an action for negligence in not making this indorsement upon a writ served by him; although the plaintiff's attorney may be liable for such negligence, where the plaintiff has been damaged thereby (*Curlewis* v. *Broad*, 1 H. & C. 322; L. J. 31, Ex. 473).

As to service of writ on corporation and inhabitants of hundreds and towns.

16. Every such writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the town clerk, clerk, treasurer or secretary of such corporation; and every such writ issued against the inhabitants of a hundred or other like district may be served on the high constable thereof, or any one of the high constables thereof; and every such writ issued against the inhabitants of any county of any city or town, or the inhabitants of any franchise, liberty, city, town or place not being part of a hundred or other like district, on some peace officer thereof.

See further as to the service of writs on corporations, *post*, pp. 14, 15.

This section does not apply to a foreign corporation (*Ingate* v. *Austrian Lloyd's*, 4 C. B., N. S. 704; L. J. 27, C. P. 323).

Proceedings where personal service cannot be effected, but defendant knows of the writ, and evades service.

17. The service of the writ of summons, wherever it may be practicable, shall, as heretofore, be personal; but it shall be lawful for the plaintiff to apply from time to time, on affidavit, to the court out of which the writ of summons issued, or to a judge; and in case it shall appear to such court or judge that reasonable efforts have been made to effect personal service, and either that the writ has come to the knowledge of the defendant, or that he wilfully evades service of the same, and has not appeared thereto, it shall be lawful for such court or judge to order that the plaintiff be at liberty to proceed as if personal service had been effected, subject to such conditions as to the court or judge may seem fit.

The service of the writ, by delivery of a true copy of it to the defendant, must be personal, and should be made by some one who knows the defendant and can swear to his identity. A writ should not be served on a defendant when he is attending a court of justice (*Cole* v. *Hawkins*, 2 Stra. 1094); but where a writ is so served the service will not be set aside for irregularity, *ideri non*

debet, factum valet (*Poole* v. *Gould*, 1 H. & N. 99). Where a husband and wife are sued together, service on the husband is sufficient (*Buncombe* v. *Love*, Barnes, 406). It was formerly held that *personal* service was absolutely necessary in the case of a lunatic, as he could not know of the writ and evade its service (*Williamson* v. *Moggs*, L. J. 28, Ex. 5; *Holmes* v. *Service*, 15 C. B. 293; L. J. 24, C. P. 24; and *Ridgway* v. *Cannon*, 2 W. R. 473; 23 L. J. 143, Q. B., E. T. 1854); formerly a *distringas* was necessary (*Blake* v. *Cooper*, 11 C. B. 680); but it has since been decided by the Court of Exchequer that an action may proceed against a lunatic on the writ of summons coming to his knowledge (*Kimberley* v. *Allen*, 8 L. T., N. S. 398; Ex., E. T. 1863), in the same way as against any other person; (*per* Bramwell, B., *Ib.*); this case was followed in the case of *Roffey* v. *Provezende*, by the same learned judge in chambers (H. T. 1867, *ex rel. am.*).

Where the governor of a prison refused to allow service of a writ upon a defendant in the prison, the court granted a rule to show cause why an attachment should not issue against him; whereupon service was permitted (*Danson* v. *Le Capelain*, L. J. 21, Ex. 219); and this course was followed in *Denison* v. *Hardings* (2 Weekly Notes, 1867, p. 17, Q. B., H. T.), where the defendant was confined in an asylum. Another method of procedure in such a case is to apply for a habeas to bring up the defendant to be served (*Ridgway* v. *Cannon*, *ubi sup.*), but see the remarks of the Court of Exchequer, on this course, in *Denison* v. *Hardings* (*ubi sup.*). As to service on Commissioners of Admiralty, see *Williams* v. *Commissioners for executing the Office of Lord High Admiral* (11 C. B. 420).

Undertaking to appear.

As a general rule, there is no equivalent for personal service (*Russell* v. *Lowe*, 2 Dowl. N. S. 233); except an undertaking by an attorney to appear, which will be enforced by attachment (R. G., H. T. 1853, r. 3, *post*; *Jacob* v. *Magnay*, L. J. 12, Q. B. 93; *Morris* v. *James*, 6 Dowl. 514).

There are several cases which show that, to have enabled the plaintiff to enter an appearance for the defendant (*sec. stat.*), under the former system of procedure, *actual personal* service was absolutely necessary—a knowledge and handling even of the writ, and a sight of it, with information of its nature, were not considered sufficient (*Thomas* v. *Pearce*, 4 D. & L. 317; *Goggs* v. *Lord Huntingtower*, 1 D. & L. 599; *Heath* v. *White*, 2 D. & L. 40; *Christmas* v. *Eicke*, 6 D. & L. 156). Leaving a copy of a writ with a female servant at the lodgings of the defendant has been held not to be good service (*Price* v. *Thomas*, 11 C. B. 543). Under the above section, the fact of the writ "coming to the knowledge" of the defendant is sufficient to enable the plaintiff to proceed; and in cases similar to some of those above cited, it is probable that the plaintiff will be allowed to proceed as if personal service had been effected.

Proceedings as if service had been effected.

To obtain authority to proceed as if personal service had been effected, under s. 17, a mode of procedure which has been substituted for a *distringas*, it is necessary to show—1stly. That reasonable efforts have been made to effect personal service; 2ndly. Besides these efforts, either that the writ itself has come to the knowledge of the defendant, or that he wilfully evades service of the same; and 3rdly. That no appearance has been entered.

Reasonable efforts to effect service.

1stly. The efforts that will be considered *reasonable* are generally such as were considered necessary before applying for a *distringas*; they must be reasonable according to the actual facts and not merely according to the plaintiff's knowledge of them (*Flower* v. *Allan*, 2 H. & C. 688; L. R. 33, Ex. 83). The plaintiff should make three separate applications (*Gale* v. *Winkes*, 2 Bing. N. C. 294; although two calls have been considered sufficient in some cases [*per* Erskine, J., *Mills* v. *Boultbee*, 1 Dowl. N. S. 707]) at the defendant's residence (*Croft* v. *Brown*, 7 Q. B. 284; *Russell* v. *Knowles*, 2 D. & L. 595) on different days (*Cross* v. *Wilkins*, 4 Dowl. 297), unless an appointment is made by or *on behalf* of the defendant for a second call on the same day (*Jamieson* v. *Wilkins*, 2 Dowl. N. S. 331); in the recent case of *Geviller* v. *Fauntleroy* (2 Weekly Notes, 1867, p. 37, H. T.), the Court of Common Pleas held, that it was necessary to prove that three calls had been made and two appointments, and that a copy of the writ had been left. The calls must be at the residence of the defendant (*Rock* v. *Adam*, L. J. 15, C. P. 192), unless he has no fixed residence, or has left and cannot be found (*Greenwood* v. *Selden*, 9 Dowl. 72), in which case it must be shown that he is not abroad (*Norman* v. *White*, 4 Bing. N. C. 636); but where the defendant has a place of business where he may be found it may be sufficient to endeavour to serve him there (*Tomlinson* v. *Goatley*, L. R. 1, C. P. 230). The calls may be made at the defendant's place of business if his residence be unknown (*Baker* v. *Coe*, 1 Exch. 153), and it must appear from the affidavit that such is the fact (*Anon.*, 2 D. & L. 1001), and it must also be shown that reasonable efforts have been made to ascertain it (*Davies* v. *Westmacott*, 7 C. B., N. S. 829; L. J. 29, C. P. 150), even where a copy of the writ has been left at the defendant's club house, and is shown to have come to his hands (*Ib.*). The nature of the business ought to be mentioned, and notice given of the intended future call, and the day and hour mentioned, or an appointment made with the defendant (*Johnson* v. *Rowse*, 1 Dowl. 641; *Crosse* v. *Wilkins*, *ubi sup.*; *Newman* v. *Hickman*, 9 Dowl. 546). On the last call a copy of the writ should be left for the defendant (*Hill* v. *Maule*, 2 Dowl. 10).

These particulars should be mentioned in the affidavit on which the application to the court or judge is made, which ought to state the writ of summons to have been regularly issued and indorsed (*Wakeley* v. *Teesdale*, 2 L. M. & P. 85). The inquiries made by the party endeavouring to serve the writ should also be stated in the affidavit (*Dubois* v. *Lowther*, 4 C. B. 228), as should also the answers made to the inquiries (*Fisher* v. *Goodwin*, 2 C. & J. 94), that the court may judge whether the defendant is in truth avoiding service.

It must be distinctly shown that the defendant knows of the writ and evades its service (*Kitchen* v. *Wilson*, 4 C. B., N. S. 483).

Writ's coming to defendant's knowledge.

2ndly. The facts to show that the writ has come to the knowledge of the defendant must depend on each particular case, as must also those from which can be derived the conclusion, that he evades service of the writ (see *Thomas* v. *Pearce*, *Goggs* v. *Lord Huntingtower*, *Heath* v. *White*, *Christmas* v. *Eicke*, *Russell* v. *Lowe*, *Davies* v. *Westmacott*, *ubi supra*). Where it can clearly be shown that the defendant is aware of the writ, and merely avoids

service, the strict requirements as to the efforts to be made to effect service are not generally insisted on (*Wilkins* v. *Jones*, 3 D. & L. 747); and see *Gorringe* v. *Terrewest* (2 L. M. & P. 12; L. J. 20, Q. B. 209), in which case the defendant had corresponded with the plaintiff's attorney as to a compromise of the action; see also *Barringer* v. *Handley* (12 C. B. 720).

Where the defendant was ill and could not be seen, a *distringas* was, under the old practice, granted after the usual applications (*Shepperd* v. *Williams*, 11 C. B. 682).

No appearance.

3rdly. The fact of no appearance having been entered for the defendant may be stated in the same affidavit as the attempts to effect service, or in a separate affidavit. The search must be made before any application for leave to proceed, as if service had been effected. It should appear to have been recent (*Hooker* v. *Townsend*, 1 Hodges, 204), and, if possible, on the day on which the application for leave to proceed is made (*Spence* v. *Barker*, 8 Dowl. 296). A search four days old has been considered stale (*Drinkwater* v. *Mill*, 12 C. B. 452).

Application for leave to proceed.

The application ought to be, "that the plaintiff be at liberty to proceed as if personal service had been effected" on the defendant. It cannot be made until after the lapse of eight days from the last attempt to serve the defendant (*Brian* v. *Stretton*, 1 Dowl. 642), nor must it be delayed for an unreasonable time (*Bromage* v. *Ray*, 9 Dowl. 599); two months have not been considered an unreasonable delay (*Peyton* v. *Wood*, 15 M. & W. 608).

The application is made *ex parte*, and the rule may be made absolute in the first instance (*Barringer* v. *Handley*, *ubi supra*).

The court will not interfere with a judge's discretion in refusing leave to proceed (*Tomlinson* v. *Goatly*, L. R. 1, C. P. 230).

The statements in the affidavit on which the application is founded ought to be clear and satisfactory, since, under the old law, the *distringas* was itself a kind of notice to the defendant that he might appear. It would seem that a rule or judge's order, when obtained, will not be set aside on affidavits merely contradicting those on which the rule or order was obtained (*Whittaker* v. *Crocker*, 2 L. M. & P. 76).

Where the defendant *carried on business* in England at the time of the issuing of the writ, an order to proceed, made under the above section, will not be set aside, when it is left at all *doubtful* whether the defendant then *resided* in England (*Naef* v. *Mutters*, 12 C. B., N. S. 816; L. J. 31, C. P. 357).

But the defendant is entitled to have the order set aside on *showing* that he has been without the jurisdiction ever since the issuing of the writ (*Hesketh* v. *Fleming*, L. J. 24, Q. B. 255), Bail Court, *cor.* Coleridge, J., which case was followed in *Flower* v. *Allan* (2 H. & C. 688; L. J. 33, Exch. 83), where the defendant was a domiciled Scotchman resident in Scotland.

Statutory Service of Writs.

Public companies.

As regards the service of writs and other proceedings on public companies, commissioners, &c., statutory modes of service are generally given. The Companies Clauses Consolidation Act (8 Vict. c. 16, s. 135), provides that service on the secretary shall be sufficient. It has been held that service on the secretary to

the Caledonian Railway Company,—which is partly in England and partly in Scotland,—while he was attending a meeting in London, was good service (*Wilson* v. *Caledonian Railway Company*, 5 Exch. 822); but in a similar case, where the service was effected at the office of the company in Scotland, the service was set aside (*Thompson* v. *North British Railway Company*, 42 Law Times, p. 95, Ex. M. T. 1866), in which case the court ordered the service of the writ of *summons* to be set aside, not of a writ of *execution*, as stated in the above report (*ex rel. am.*).

Chartered companies.

The statute 7 Will. 4 & 1 Vict. c. 73, s. 26, provides, with reference to trading companies, that service of any writ or notice on the *clerk*, or by leaving the same at the head office for the time being of the company, or in case such clerk shall not be found or known, then service thereof on any agent or officer employed by the company, or by leaving the same at the usual place of abode of such agent or officer, shall be deemed good and sufficient service on the company.

The word *clerk* here means chief clerk, not a mere clerk employed under a secretary, or other clerk (*Walton* v. *Universal Salvage Company*, 16 M. & W. 438).

Corporations.

Service upon a corporation aggregate is provided for by sect. 16 (*ante*, p. 11).

Joint-Stock companies.

It would seem that service of writs might be made at the company's office on the *secretary* of a joint-stock company completely registered under 7 & 8 Vict. c. 110.

Service upon a director of a company registered under the 19 & 20 Vict. c. 47, was held bad (*Towne* v. *Limerick Steam Ship Company, Limited*, 5 C. B., N. S. 730); but it has been held (at chambers) good, where the writ had subsequently come to the knowledge of the secretary of a company (*ex rel. am.*).

The Companies Act, 1862, contains the following important provisions about the service of summonses, &c.:—

Sect. 62. *Service of notices on company.*]—Any summons, notice, order or other document required to be served upon the company may be served by leaving the same, or sending it through the post in a prepaid letter addressed to the company, at their registered office.

Sect. 63. *Rules as to notices by letter.*]—Any document to be served by post on the company shall be posted in such time as to admit of its being delivered in the due course of delivery within the period (if any) prescribed for the service thereof; and in proving service of such document it shall be sufficient to prove that such document was properly directed, and that it was put as a prepaid letter into the post-office.

Sect. 64. *Authentication of notices of company.*]—Any summons, notice, order or proceeding requiring authentication by the company may be signed by any director, secretary or other authorized officer of the company, and need not be under the common seal of the company, and the same may be in writing or in print, or partly in writing and partly in print.

Printer, &c. of newspaper.

In an action against any printer, publisher or proprietor of any newspaper, service of any writ or notice at the house or place mentioned in the declaration of such printer, &c., as the house or place at which such newspaper is printed or published, shall be good and sufficient service upon any person named in such

declaration as printer, publisher or proprietor of the newspaper therein mentioned (6 & 7 Will. 4, c. 76, s. 9).

The above observations as to the service of the writ of summons apply, of course, to a renewed or concurrent writ.

Irregularity in Service of Writs.

If the service of the writ is irregular, it may be set aside. If the irregularity is apparent from the copy served, as, for example, if there is no indorsement of the amount of costs claimed by the plaintiff, the defendant may apply either to the court or to a judge at chambers to set it aside; and the application should be to set aside the *service* (*Truslove* v. *Whitechurch*, 8 Dowl. 837; *Hall* v. *Redington*, 5 M. & W. 603; see also *Wills* v. *Dawson*, 2 Dowl. N. S. 465; *Hemp* v. *Warren*, 2 Dowl. N. S. 758). As to applications to set aside, see sect. 20 (*post*, p. 28), and R. G., H. T. 1853, rr. 135, 136, 137, *post*.

Waiver of irregularity.

An objection to the service of a writ may be waived by lapse of time (*Holmes* v. *Russell*, 9 Dowl. 487; *Davis* v. *Sherlock*, 7 Dowl. 530); by taking a step in the cause (*Homfray* v. *Kenning*, 2 Chit. Rep. 236; R. G., H. T. 1853, r. 135, *post*); by asking for time to pay (*Rawes* v. *Knight*, 1 Bing. 132); or by promising to settle (*Lloyd* v. *Hawkyard*, 1 M. & R. 32); or by expressing regret at not having paid (*Holt* v. *Ede*, 1 D. & L. 68).

Notice not to appear.

If the plaintiff discovers an irregularity in the writ, copy or service, he may give the defendant notice not to appear, which will prevent the defendant, if he have had notice in time, from incurring further costs. If he has incurred costs, as, for instance, by obtaining a rule or summons to set aside the proceedings, such costs should be tendered.

See also as to reasonable time within which to apply, and also as to application of the R. G., H. T. 1853, r. 135 (*post*), *Bayne* v. *Slack* (3 C. B., N. S. 363; L. J. 27, C. P. 14).

As to actions against British subjects residing out of the jurisdiction of the Superior Courts.

18. In case any defendant, being a British subject, is residing out of the jurisdiction of the said Superior Courts, in any place except in Scotland or Ireland,* it shall be lawful for the plaintiff to issue a writ of summons in the form contained in the Schedule A. to this act annexed, marked No. 2, which writ shall bear the indorsement contained in the said form, purporting that such writ is for service out of the jurisdiction of the said Superior Courts; and the time for appearance

* It is to be observed that a writ cannot be issued under this section against a defendant residing in Scotland or Ireland. The words creating this exception were introduced into the act at the last moment. A Scottish plaintiff may sue an English defendant in the courts of Scotland if he have *any* property [*semble*, of whatsoever nature and howsoever small (*London and North Western Railway Company* v. *Lindsay*, 3 McQueen's H. L. Rep. 99)], which can be attached *jurisdictionis fundandæ causâ*, and the latter may never hear of the action till he finds his property seized by a judgment creditor. An English creditor has no such remedy against a debtor in Scotland or Ireland. He must go to the Scottish or Irish courts, as the case may be; and this even if the debtor have all his property in this country. But one who is not a British subject may be proceeded against by English process under s. 19 (*post*, p. 27), though resident in Scotland or Ireland. See the observations of Westbury, L. C., in *Cookney* v. *Anderson* (1 De G., J. & S. 365; L. J. 32, Ch. 427).

by the defendant to such writ shall be regulated by the distance from England of the place where the defendant is residing; and it shall be lawful for the court or judge, upon being satisfied by affidavit that there is a cause of action, which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction, and that the writ was personally served upon the defendant, or that reasonable efforts were made to effect personal service thereof upon the defendant, and that it came to his knowledge, and either that the defendant wilfully neglects to appear to such writ, or that he is living out of the jurisdiction of the said courts in order to defeat and delay his creditors, to direct from time to time that the plaintiff shall be at liberty to proceed in the action in such manner, and subject to such conditions, as to such court or judge may seem fit, having regard to the time allowed for the defendant to appear being reasonable, and to the other circumstances of the case: provided always, that the plaintiff shall and he is hereby required to prove the amount of the debt or damages claimed by him in such action, either before a jury upon a writ of inquiry, or before one of the Masters of the said Superior Courts, in the manner hereinafter provided, according to the nature of the case, as such court or judge may direct; and the making such proof shall be a condition precedent to his obtaining judgment.*

The indorsement required by s. 8 (p. 6, *ante*), should be made on this writ, but should allow the defendant the time limited for appearance to pay the debt and costs.

This simple procedure has been substituted in lieu of the proceeding to outlawry. While an absent defendant has ample opportunity of defending himself, reckless and fraudulent debtors are no longer able to set their creditors at defiance by leaving the country.

Writ. This writ of summons differs from the ordinary writ in not specifying in the body of it the time for entering an appearance. This is left to the plaintiff, who must judge for himself what time it will require to enable the defendant to appear (which will depend, of course, upon the place of his residence), and fill up the blanks in the writ and indorsement accordingly. The indorsement of the name and address of the person issuing the writ must be as special as in the case of an ordinary writ (p. 4, *ante*). It has likewise an indorsement that the writ is for service out of the jurisdiction.

Indorsements on writ.

The previous observations as to the issue and service of ordi-

* Execution upon the judgment thus obtained may be made available against the defendant's property in this country.

nary writs of summons apply to this peculiar writ, and there is a special provision (s. 23, *post*, p. 29) enabling consuls to take affidavits of service.

A writ for service out of the jurisdiction should be indorsed by the person serving it, as in the case of an ordinary writ of summons under s. 15 (*ante*, p. 10).

As the original writ must be shown to a defendant when served, if required by him, the original writ should, in the case of service out of the jurisdiction, be sent to the person charged with the service.

Inquiry before Master. The plaintiff cannot recover final judgment upon non-appearance, against a defendant served with process out of the jurisdiction. The proviso at the end of the section involves an inquiry before the Master (in ordinary cases) under s. 94 (*post*, p. 86).

Proceedings, if service cannot be effected. Before a plaintiff can proceed under this section, he must obtain the leave of the court or of a judge to do so, and this leave is only obtainable, 1stly, on the court or judge being satisfied by affidavit that there is a cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction; 2ndly, that the writ was personally served, or that reasonable efforts were made to effect personal service, and that the writ came to the defendant's knowledge; 3rdly, that the defendant wilfully neglects to appear to the writ, or is living out of the jurisdiction of the court in order to defeat and delay his creditors.

1. Cause of action within the jurisdiction. 1. The court or a judge must be satisfied by *affidavit* of the existence of a cause of action, and of its being within the jurisdiction of the court; but the insufficiency of the affidavit may be waived by the defendant (*Harrison* v. *Williams*, 24 L. T. 149, Q. B., M. T. 1854).

The words "cause of action" in this section have not received a uniform interpretation from the courts, but the better opinion seems to be that these words mean a substantial part of the cause of action.

A claim for a balance due as the result of cross-consignments and remittances between a merchant here and a merchant (a British subject) domiciled and carrying on business exclusively at the Cape of Good Hope, was held by the Court of Common Pleas to be a cause of action which arose within the jurisdiction of the court, and a breach of a contract made within the jurisdiction (*Horwood* v. *Wood*, 17 C. B., N. S. 749). Where a cargo had been loaded abroad under a foreign charterparty, a claim for demurrage at an English port was held, by Williams, J., at chambers, to be a cause of action arising within the jurisdiction (*Slade* v. *Noel*, 4 F. & F. 424). So where goods were delivered on board a ship in an English port for a foreign buyer under a contract made abroad, Willes, J., held, at chambers, that an action for the price was maintainable under this section (*Nettlefold* v. *Fünche*, C. P., *ex rel. am.*, 3rd March, 1866). But in *Sichel* v. *Borch* (2 H. & C. 954; L. J. 33, Ex. 179), where the defendant, a foreigner residing in Norway, there drew a bill of exchange on E., and after indorsing it to D.'s order sent it by post to D. in London who indorsed it to the plaintiff, the Court of Exchequer held that the "cause of action" did not arise within the jurisdiction; Pollock, C. B., and Martin, B., holding that these words imply the whole cause of action. In the subsequent case, however, of *Chapman* v. *Cottrell* (3 H. & C. 865; L. J. 34, Ex. 186), where

the defendant, a British subject residing at Florence, signed two promissory notes there as joint and several maker with his brother in London, to whom he sent them by post, and his brother thereupon signed the notes and delivered them to the payees in England, the same court held that the cause of action arose when the notes were delivered to the payees in this country. The principal distinction apparent between these last two cases appears to be, that in *Sichel* v. *Borch* the cause of action may be said to have been complete as against the defendant before the bill arrived in England, whereas in *Chapman* v. *Cottrell* the cause of action may be said not to have been complete as against the defendant until the notes were signed and delivered by the defendant's brother as joint maker in England. *Sed quære.* It may be remarked, that the case of *Chapman* v. *Cottrell* is more consistent with the earlier case of *Fife* v. *Round* (6 W. R. 282, H. T. 1858), in which case the Court of Exchequer held, that the dishonour in England of a promissory note made and delivered to the plaintiff in France, but payable in England, was within the section. See also *Glover* v. *Persigny* (11 W. R. 146, Q. B., M. T. 1862, cited, *post*, p. 27).

An Irish judgment for a debt, contracted in England, does not constitute a cause of action arising within the jurisdiction (*Thelwall* v. *Yelverton*, 16 C. B., N. S. 813).

The Court of Exchequer have interpreted this section so as to claim and exercise jurisdiction wherever leave has been given, whether rightly or wrongly, to proceed under it (*Hutton* v. *Whitehouse*, 1 H. & N. 32); Martin, B., observing, that "it is not required that there should be a cause of action, but that the court or a judge should be satisfied that there is one." Where, however, it appears that the cause of action did not arise within the jurisdiction, the court will set aside the writ and service (*Binet* v. *Picot*, 4 H. & N. 365; L. J. 28, Ex. 244; *Diamond* v. *Sutton*, L. R. 1, Ex. 130). When the defendant by affidavit states that the cause of action arose abroad, the plaintiff must, to support the writ, distinctly show such facts as, if true, would show that the cause of action arose, or the contract was made within the jurisdiction (*Binet* v. *Picot*, *ubi supra*).

Appearance by the defendant operates as a waiver of objection to the jurisdiction (*Forbes* v. *Smith*, 10 Exch. 717; *Staniforth* v. *Richmond*, 13 W. R. 724; Bail C., E. T. 1865, *cor.* Crompton, J.).

The costs of foreign service are allowed on taxation (*White* v. *Brett*, L. J. 28, Ex. 32).

Affidavits.

As affidavits will be required in many of the proceedings under the statute, it may not be inopportune in this place to state, as succinctly as possible, the general rules to be followed in framing these instruments.

Affidavits.

(a) *Their Title.*

Court. *Cause.* *Parties.*

An affidavit should be entitled in the court in which the action is brought (*Molling* v. *Poland*, 3 M. & S. 157). It should also be entitled in the cause (*Ball* v. *Stanley*, 6 M. & W. 396); in which case it ought to state the christian names and surnames of all the parties to the action, otherwise it cannot be used (*Anderson* v. *Beler*, 3 Dowl. 107; *Cohen* v. *Williams*, 8 Dowl. 418). Thus an affidavit entitled *A.* v. *B. and others*, would be bad (*Doe* dem.

Initials of parties.

Pryme v. *Roe*, 8 Dowl. 340). The christian name and surname should be stated at length (*Masters* v. *Carter*, 4 Dowl. 577). In actions upon *bills of exchange, promissory notes*, or other *written instruments*, any of the parties to which are designated by the initial letter or letters, or some contraction, of the *christian* or first name or names, it is sufficient to designate such person in an affidavit by the same initial letter or letters, or contraction, of the *christian* or first name or names, instead of stating the *christian* or first name or names in full (3 & 4 Will. 4, c. 42, s. 12); the affidavit should show such initials to have been so used (*Holbert* v. *Williams*, 8 Dowl. 139). Where the defendant is described by *initials*, by a *wrong name*, or *without a christian name*, it should appear that due diligence has been used to obtain knowledge of the proper name; but as a general rule it is sufficient if the identity of the parties clearly appears (*Baldwin* v. *Bannerman*, 12 C. B. 152). It should also clearly appear which parties are plaintiffs and which defendants (*Harris* v. *Griffith*, 4 Dowl. 289). Entitling a cause as "*C. D. ats. A. B.*" instead of *A. B.* v. *C. D.* has been held bad (*Richards* v. *Isaac*, 2 Dowl. 710). If defective in either of these respects, the affidavit may be rejected.

Representative character.

If the plaintiff sue, or the defendant is sued, in a representative capacity, as executor, administrator or assignee, his *representative character* must be stated (*Wright* v. *Hunt*, 1 Dowl. 457); and the party of whom the plaintiff or defendant is executor, administrator or assignee must be stated; "assignee, &c.," for instance, being insufficient (*Casley* v. *Smith*, 4 Dowl. 477).

(b) *By whom to be made.*

The affidavit as to the cause of action need not necessarily be made by the plaintiff. It may be made by one of several plaintiffs (*Swayne* v. *Crammond*, 4 T. R. 176). It may be made by another person, who can swear to the cause of action, the existence of which should not only be shown according to his knowledge, but the means of that knowledge should appear, that the court or judge may see whether the deponent has sufficient means of knowledge.

Abode of deponent.

The true abode and the addition of the deponent, or of all the deponents, if several, should be stated in the affidavit (*Cobbett* v. *Oldfield*, 16 M. & W. 469; R. G., H. T. 1853, r. 138, *post*). It is, however, sufficient in affidavits sworn by a party to the cause to describe the deponent as "the above-named plaintiff (or defendant)," without inserting the place of abode, or any other addition (*Shire* v. *Walker*, 2 M. & G. 917).

It is sufficient if the deponent describe himself as "of the city of London, merchant" (*Vassier* v. *Alderson*, 3 M. & S. 165); or as "of Bath, in the county of Somerset, esquire" (*Coppin* v. *Potter*, 2 Dowl. 785); and see *Hewer* v. *Cox* (L. J. 30, Q. B. 73), for decision under the Bills of Sale Act.

Foreigner.

Where a foreigner, who had come to this country merely for temporary purposes, described himself as of his place of residence abroad, it was deemed sufficient (*Boutchet* v. *Kittoe*, 3 East, 154).

Clerk.

It is sufficient if the clerk to an attorney state the place of business of such attorney as his residence (*Strike* v. *Blanchard*, 5 Dowl. 216; *Attenborough* v. *Thompson*, 2 H. & N. 559). Where a deponent described himself as "S., clerk to E. J., esq., barrister-at-law, and assessor of the Court of Passage of the borough of L.," the affidavit was rejected (*Winch* v. *Williams*, 12 C. B. 416.)

A clerk may describe himself as of the office where he does business during the day, although he sleep elsewhere (*Haslop* v. *Thorne*, 1 M. & S. 103).

A person lately discharged from prison, but who slept there, was held sufficiently described as late of that prison. The residence stated must be the *true* one: therefore a deponent cannot describe himself as *late* of a place where he has ceased to reside, when he actually resides elsewhere at the time (*Sedley* v. *White*, 11 East, 528).

Addition of deponent.

An affidavit must state the rank or degree in life, profession or trade of the deponent, unless he is a party in the cause. This addition ought to be stated with sufficient certainty. "Merchant" (*Vassier* v. *Alderson*, *ubi supra*), "manufacturer," "late clerk to," &c., "managing clerk to," &c. (*Simpson* v. *Drummond*, 2 Dowl. 473), "agent of the plaintiff" (*Luxford* v. *Groombridge*, 2 Dowl. N. S. 332), have been held to be sufficient additions; but see *Winch* v. *Williams* (*ubi supra*). An affidavit by "R. J., late of the city of W., victualler, but now of," &c., without further addition, has been held sufficient (*Angel* v. *Ihler*, 5 M. & W. 163). But "assessor" is not sufficient (*Nathan* v. *Cohen*, 3 Dowl. 370). And the descriptions "acting as managing clerk," &c. (*Grares* v. *Browning*, 6 A. & E. 805); or "articled clerk" (*R.* v. *Reeve*, 4 Q. B. 211); are insufficient if it be not stated *to whom* or in what profession; an attorney's clerk should not be described as a "gentleman" (*Tuton* v. *Sanover*, 3 H. & N. 280; L. J. 27, Ex. 293; *Beales* v. *Tennant*, L. J. 29, Q. B. 188; decided under the Bills of Sale Act); and as to the propriety of the addition "gentleman" to other persons than attorneys, see Chit. Stat., 3rd ed. vol. iii. p. 417, notes, and vol. iv. p. 1066.

It is not necessary to give any addition to any party mentioned in the affidavit, but to the deponent (*Wallis* v. *Foyce*, 1 D. & R. 150).

(c) *The Contents.*

Distribution.

Affidavits must be divided into paragraphs, and each paragraph must be numbered consecutively, and must be confined as near as may be to a distinct portion of the subject (R. G., M. V. 1854, r. 2, *post*).

Must be certain and explicit.

The statements made in an affidavit should be such that perjury may be assigned on them if they are false; they should, therefore, be distinctly expressed. Everything that is material should be stated, as the defendant may have no opportunity to deny the truth of the statement, and nothing should be left to intendment (*Frick* v. *Poole*, 9 B. & C. 543); but at the same time no irrelevant matter should be introduced. Statements as to the existence of a cause of action must be direct and positive, and not argumentative (*Pomp* v. *Ludvigson*, 2 Burr. 655). Swearing to a debt, "as deponent believes" (*Rios* v. *Belisant*, 2 Str. 1209); or, "as appears by the bond" (*Heathcote* v. *Goslin*, 2 Str. 1157); or, "by the agreement" (*Jennings* v. *Martin*, 3 Burr. 1447); or, "according to the bill delivered to the defendant" (*Williams* v. *Jackson*, 3 T. R. 575); or even swearing that defendant is indebted in a sum "for which he has not accounted" (*Champion* v. *Gilbert*, 4 Burr. 2126), would not be sufficient. See observations as to swearing "on information and belief" in *Arndt* v. *Porter* (L. J. 30, Ex. 19). An affidavit "to the best of the belief" of the deponent, was held sufficient under the Bills of Sale Act (*Roe* v. *Bradshaw*, L. R. 1, Ex. 106). An affidavit of debt for goods

sold and delivered, which went on to state that the creditor had received no other security save certain bills of exchange, overdue and unpaid, was by Lord Tenterden, at chambers, held insufficient, as it did not allege that the creditor was the holder. An affidavit, however, that the defendant is indebted in such a sum "as the plaintiff computes it," would be good (*Moaltby* v. *Richardson*, 2 Burr. 1032).

May be to deponent's belief.

Where it is from the circumstances clearly *impossible* to swear *positively* (as where the cause of action arose from non-payment of bills in India), it is considered sufficient to state that the bills were not paid "to deponent's knowledge and belief" (*Hobson* v. *Campbell*, 1 H. Bl. 245; and see *Roe* v. *Bradshaw*, *ubi supra*).

When facts are not within the deponent's knowledge, he should allege that he has been informed thereof, and that he verily believes them to be true.

Clerical errors.

Clerical errors are not considered sufficient ground for rejecting an affidavit when the meaning is clear. But this will depend upon whether the mistake is material or not. In a case where a party sued by *his* next friend, and the affidavit stated the suit to be by *her* next friend, the affidavit was upheld. An affidavit, however, in which the word "oath" was omitted (*Oliver* v. *Price*, 3 Dowl. 261); and another in which the word "said" was substituted for "saith" (*Howorth* v. *Hubbersty*, 3 Dowl. 455), were held insufficient.

Where deponent sues en autre droit.

Affidavits made by parties claiming debts *en autre droit*, should be as direct and positive as the circumstances of the case will permit. In cases where the creditor's claim arises to him *en autre droit*, as an executor, administrator or assignee, it is not necessary that he should swear positively; it is enough if he swears to his belief (*Roche* v. *Carey*, 2 W. Bl. 850). It would appear that an assignee of a bankrupt may swear to the debt "as it appears by the bankrupt's books," or "by his last examination," adding the usual words, "as he verily believes" (*Touna* v. *Edwards*, 4 Burr. 2283). Dates, when material, should be sworn to positively; but affidavits by an executor, who swore to the debt being due to the testator, "as appears from a statement made from the testator's books by an accountant employed to investigate the same, as deponent verily believes" (*Rowney* v. *Deane*, 1 Price, 402); by an assignee of a bankrupt who swore to the debt, as it appears from the letters of *A.* and *B.* "as this

Bankrupt.

deponent believes" (*Molling* v. *Buckholtz*, 2 M. & S. 563); by a bankrupt, who stated that the debtor was indebted to the deponent before the commission, and, "as he believed," was still indebted to his assignees on a bill accepted by him, endorsed by the drawer to deponent, and, "as he believed," still unpaid (*Tucker* v. *Francis*, 12 Moo. 347), have been respectively held insufficient. An assignee, as above stated, will be allowed to swear "to the best of his knowledge and belief," to all facts not within his own knowledge. If, however, an executor or assignee swear positively to the debt, the affidavit will not be rejected on that account, however improbable it may be that the deponent should have such positive knowledge.

Surviving partner.

An affidavit of a debt by a surviving partner should show that the other partner is dead (*Morrell* v. *Parker*, 6 Dowl. 123). An affidavit that the defendant was indebted to the plaintiff and his wife as administratrix of *J. P.* deceased, was considered sufficient, without stating expressly that *J. P.* died intestate (*Coppin* v. *Potter*, 2 Dowl 785).

(d) *The Cause of Action.*

It may be useful to refer to a few of the cases illustrative of what have been held *sufficient* and what *insufficient* statements of "*cause of action*,"—cases generally decided on applications to hold defendant to bail; but the principles laid down in these cases may be considered generally applicable to an affidavit necessary for obtaining leave to proceed on a defendant's absence and non-appearance. *Causes of action.*

In a case where the defendant was stated to be indebted to the deponent, under a *deed* by which the defendant covenanted to pay money at a time *now past* (*Lambert* v. *Wray*, 3 Dowl. 1691); and in another, where the defendant was said to be indebted to the plaintiff in *500l.* "upon a certain *indenture of mortgage*, by which the defendant covenanted to pay the said sum of money to the plaintiff at a certain day now past" (*Masters* v. *Billing*, 3 Dowl. 751); the affidavits were held sufficient. *Deed.*

An affidavit on a bond should state the bond to be due and payable (*Smith* v. *Kendal*, 7 D. & R. 232). In a case where the affidavit stated the debt to "be for *principal* and *interest* due on a *bond*," without stating the bond to be conditioned for the payment of money (*Byland* v. *King*, 7 Taunt. 275), it was held sufficient. *Bond.*

An affidavit of debt on an *award* should state the submission, the making of the award, and that the money was due at a day past (*Anon.* 1 Dowl. 5). If the award direct the money to be paid by defendant to plaintiff on demand, such demand should be stated (*Driver* v. *Hood*, 7 B. & C. 494). An affidavit that the defendant was indebted for damages awarded, and for costs and expenses taxed and allowed, has been held sufficient (*Jenkins* v. *Law*, 1 B. & P. 365). *Award.*

Where the debt arises on bills or promissory notes, these should be stated to be due and unpaid (*Kirk* v. *Almond*, 1 Dowl. 318). If a note is payable by instalments, the affidavit should show what instalments are due and unpaid (*Hart* v. *M'Gerris*, 3 Tyr. 238). An affidavit, stating the defendant to be indebted in a certain sum, as the balance of a bill drawn by plaintiff and accepted by the defendant, and due at a day past, has been held sufficient (*Walmsley* v. *Dibden*, 4 Moo. & P. 10). *Bills and notes.*

It should also appear how the defendant is liable, whether as acceptor, drawer or indorser (*Humphreys* v. *Winslow*, 6 Taunt. 531). The affidavit should show the character in which the plaintiff claims, whether as indorsee or payee; and if as indorsee, it should state by *whom* the bill was indorsed (*Lewis* v. *Gompertz*, 1 Dowl. 319).

Intermediate indorsements need not be stated when the maker of a promissory note is sued by an indorsee of the payee (*Luce* v. *Irwin*, 6 Dowl. 92); in actions against the drawer of a bill, the affidavits should allege the presentment to, and the default of the acceptor, or facts to dispense with these allegations; but it need not allege notice of dishonour (*Simpson* v. *Dick*, 3 Dowl. 731).

Affidavits of debt for "goods sold," not stating delivery, and for "goods sold and delivered," not stating "by the plaintiff to defendant" (*Young* v. *Gatien*, 2 M. & S. 603; *Handley* v. *Franchi*, L. R. 2, Ex. 34); for goods sold and delivered to the defendant without saying "by the plaintiff" (*Carthrow* v. *Hagger*, 1 East, 106); and for goods sold and delivered *for* the defendant, instead of *to* the defendant (*Bell* v. *Thrupp*, 2 B. & A. 596); for work done and materials provided, and goods manu- *Goods sold, &c.*

factured and made by the deponent for the defendant at his request (*Pontifex* v. *Maltzoff*, 1 Exch. 436), have been held bad.

Money lent, &c. An affidavit of debt for money paid, laid out, and expended, and lent and advanced, by plaintiff "to" the defendant, and at his request, omitting the words "for the defendant," has been held insufficient (*Frick* v. *Poole*, 9 B. & C. 543). An affidavit for money had and received on account of the plaintiff ought to state it to have been received by the defendant to the plaintiff's use (*Kelly* v. *Curzon*, 4 A. & E. 622).

Account stated. An affidavit that defendant is indebted to plaintiff in 1,000*l.*, under an agreement in writing, whereby defendant undertook to pay plaintiff the balance of accounts, &c. "which said balance is still due and unpaid," without stating that the balance was 1,000*l.*, was held insufficient (*Hatfield* v. *Linguard*, 6 T. R. 217). But an affidavit that defendant is indebted to plaintiff on the "balance of an account stated," without adding "and settled" (*Tyler* v. *Campbell*, 3 Bing. N. C. 675); and an affidavit, stating defendant to be indebted to plaintiff "on an account stated between them," have been held sufficient (*Balmanno* v. *May*, 6 Dowl. 306).

Guarantee. An affidavit against the surety, on a guarantee for goods, should show the amount guaranteed, the terms of the guarantee, that the time for payment had elapsed, and that the principal debtor had not paid (*Angus* v. *Robilliard*, 2 Dowl. 90).

Breach of agreement. An affidavit of a cause of action arising on the breach of an agreement must state a *breach of the agreement* (*Stinton* v. *Hughes*, 6 T. R. 13).

Interest. If interest be sought to be recovered as a debt, the affidavit should show an express contract (*Harrison* v. *Turner*, 4 Dowl. 72). It need not state the amount of the principal, nor the time when it began to run (*White* v. *Sowerby*, 3 Dowl. 584).

(e) *Before whom Affidavits to be used in the Superior Courts may be sworn.*

Affidavits to be used in the Superior Courts may be sworn before the court or the judge to whom the application is made. An affidavit sworn before a judge of one of the Superior Courts may be used in the court to which such judge belongs, but not in any other court unless entitled in such other court (R. G., H. T 1853, r. 144, *post*). They may also be sworn before a commissioner empowered to take affidavits in the court in which the affidavit is entitled (29 Car. 2, c. 5, s. 2). See as to affidavits sworn before attornies, their agents, and clerks (R. G., H. T. 1853, rr. 142, 143, *post;* and *Horsefall* v. *Matthewman*, 3 M. & S. 154).

Sworn abroad. Affidavits, if sworn in Scotland or Ireland, may be sworn before a commissioner of the court appointed to take affidavits (3 & 4 Will. 4, c. 42, s. 42). An affidavit may also be sworn either before a judge or magistrate, or other person authorized by law to take affidavits. If the affidavit be sworn before a judge, the judge's signature to the jurat must be verified by affidavit to be made in this country (*Dalmer* v. *Bernard*, 7 T. R. 252). If sworn before a magistrate or other person, not only the signature, but also the authority to administer an oath, must be verified in like manner, or by the certificate of a notary public (*Ex parte Worsley*, 2 H. Bl. 275), or a British consul acting in this case as a notary public (6 Geo. 4, c. 87, s. 20; *Re Barber*, 4 Dowl. 640).

A notarial certificate proves itself (*Coles* v. *Sherrard*, 11 Exch. 482); as to its effect, see *Chesmer* v. *Noyes* (4 Camp. 129).

Abroad.

An affidavit made abroad may be sworn before a magistrate there, but his signature and his authority to administer an oath must be verified in like manner (*Omealy* v. *Newell*, 8 East, 364; *Re Cooper*, 18 C. B., N. S. 220; L. J. 34, C. P. 220).

Affidavits and notarial acts may now be made and done abroad before and by English ambassadors and other diplomatic agents, and before consuls; and may be received in evidence without proof of the seal or signature of such ambassador or official person which they may purport to have affixed to them (18 & 19 Vict. c. 42); and see s. 23 (*post*, p. 29).

(f) *The Jurat.*

Jurat.

In the jurat must be stated the date of swearing the affidavit (*Blackwell* v. *Allen*, 7 M. & W. 146), as also the *place* and *county* where it is sworn, if sworn before a commissioner (*Cass* v. *Cass*, 1 D. & L. 698). The place, however, may be stated by reference, if it be mentioned in the body of the affidavit (*Grant* v. *Fry*, 8 Dowl. 234).

If sworn before a commissioner.

If the affidavit be sworn before a commissioner, the words "before me" must be inserted in the jurat, and the omission of these words cannot be waived (*R.* v. *Bloxham*, 2 D. & L. 168). It should appear that the person before whom it is sworn is a commissioner of the court in which it is entitled; but it is no objection that the affidavit is entitled in the Queen's Bench, and is stated to be sworn before a commissioner of the Exchequer, unless it be shown that that commissioner is not a commissioner of the Queen's Bench (*Cheney* v. *Courtnois*, 13 C. B., N.S. 634; L. J. 32, C. P. 116).

If the affidavit be made by two or more persons their several names must be written in the *jurat* (R. G., H. T. 1853, r. 139, *post*).

If deponent be illiterate.

If the affidavit be made by a person who appears to be illiterate, the fact that the affidavit was read to the party making it, and that the deponent seemed perfectly to understand the same, ought to be stated in the jurat (*Haynes* v. *Powell*, 3 Dowl. 599; R. G., H. T. 1853, r. 141, *post*). When the deponent makes his *mark*, it should appear from the jurat that the *mark was made by the deponent* (*Wilson* v. *Blakey*, 9 Dowl. 352).

If sworn abroad.

If sworn abroad, the jurat ought to state the place specially;—so held in *Walker* v. *Christian*, by Bosanquet, J., after consultation with the judges (2 Chit. Pract. 12th edit. vol. ii. p. 1621).

If made by a foreigner.

Where an affidavit is made by a foreigner in English, an interpreter must be sworn to interpret it truly, and the jurat should state that the interpreter was so sworn, and did so interpret (*Bose* v. *Solliers*, 4 B. & C. 358). If the affidavit be in a foreign language, there must be another affidavit by an interpreter as to its translation and meaning (*Re Eady*, 6 Dowl. 615).

Jurat.

A rule of the Superior Courts provides, that no affidavit shall be read or made use of in the jurat of which there shall be any interlineation or erasure (R. G., H. T. 1853, r. 140, *post*). A line drawn through two words in the jurat, leaving them, however, perfectly legible, is an erasure within this rule, and vitiates the affidavit (*Williams* v. *Clough*, 1 A. & E. 376). Striking out the date mentioned in the jurat with a pen, and introducing the right

date, is an erasure within the meaning of the above rule (*Chambers* v. *Barnard*, 9 Dowl. 557).

An alteration in the jurat, or other parts of an affidavit after it is sworn, nullifies it; it cannot be used. But if the jurat be struck out, it may be re-sworn. If an interlineation is made in an affidavit previously to its being sworn, it should be noticed by the person before whom it is sworn, by placing his initials in the margin, for, if the objection is taken, the affidavit cannot be read.

The same observations apply to affirmations. The jurat of an affirmation will, of course, be "*affirmed*," before me, &c. (See hereon the C. L. P. A. 1854, ss. 20, 21, *post*.)

An affidavit of which the jurat is defective cannot be used, and a rule procured on it will be discharged with costs (*Cobbett* v. *Oldfield*, 16 M. & W. 469).

(g) *Signature of Deponent.*

Signature of deponent.

An affidavit ought to be signed by the deponent; if he cannot write he ought to make his mark (*Wilson* v. *Blakey*, 9 Dowl. 352; *Nathan* v. *Cohen*, 3 Dowl. 370). The usual signature ought to be used, though it do not correspond with the name given to the deponent in the affidavit (*Hands* v. *Clements*, 1 D. & L. 379). An affidavit without deponent's signature, made in Germany, was admitted, it appearing that such was the practice in Germany (*Re Eady*, 6 Dowl. 615).

(h) *Exhibits.*

Exhibits referred to in or attached to affidavits must be specified (*Re Joseph Allison*, 3 W. R. 62, Ex., M. T. 1854); and copies of such exhibits, if not filed, must be given to the other side, if required (*Tebbutt* v. *Ambler*, 7 Dowl. 764).

(i) *Filing.*

All affidavits must be filed within the time (if any) prescribed, unless leave to file them afterwards be obtained (R. G., H. T. 1853, r. 145, *post*).

Affidavits used at chambers must be filed with the Masters of the court, and must be delivered to them for that purpose within ten days next after that on which the matter was disposed of (R. G., H. T. 1853, r. 147, *post*).

The rules of court relating to affidavits (which see, *post*) are R. G., H. T. 1853, rr. 139 to 148, and R. G., M. V. 1854, r. 2.

Writ must come to defendant's knowledge.

2. The court or judge must be satisfied that the defendant was personally served, or that reasonable efforts were made to effect personal service, and that the writ came to the defendant's knowledge. As to what will be considered reasonable efforts to effect personal service, see p. 13, *ante*. But it is to be observed that, from the peculiar language of s. 18, the plaintiff must do more than he is required to do by s. 17. He must not only show reasonable efforts to have been made, but he must show that the writ came to the knowledge of the defendant. As to what will constitute "a coming to the knowledge" of the defendant, see p. 13, *ante*.

3. The defendant's "wilful neglect to appear" will be presumed after the writ has come to his knowledge. There must be an affidavit of search for an appearance, as p. 14, *ante*. So also the alternative "living out of the jurisdiction to defeat and delay creditors," is a presumption to be raised from the particular facts of each case. It is not a fact to be drily stated, but in an affidavit circumstances sufficient to raise the presumption must be set out; see hereon decisions as to the acts of bankruptcy collected in Chit. Stat., 3rd ed., vol. i., pp. 271 *et seq.* *Wilful neglect to appear.*

The court or judge will order that the plaintiff be at liberty to proceed, and his proceedings are regulated by ss. 28 and 94 (*post*, pp. 34, 86).

Where a plaintiff, after trying for two years, succeeded in serving the defendant personally with a writ in Paris, under this section, the court held, that the plaintiff must make reasonable efforts to serve the declaration (*Thelwall* v. *Yelverton*, 10 Jur., N. S. 295, C. P., H. T. 1864).

In a case where it was shown that a defendant, who had been served with process in *California* under this section, and who remained there, was fraudulently making away with his property, the Court of Common Pleas (*dubitante* Willes, J.), ordered that he should plead to the declaration within eight days of its being filed at the Master's office (*Bates* v. *Bates*, 9 C. B., N. S. 561; L. J. 30, C. P. 191). And the court subsequently refused to stay the proceedings upon an appearance entered by the general attorney of the defendant after the expiration of the eight days above limited (*S. C.*, 9 C. B., N. S. 564).

19. In any action against a person residing out of the jurisdiction of the said courts, and not being a British subject, the like proceedings may be taken as against a British subject resident out of the jurisdiction, save that, in lieu of the form of writ of summons in the Schedule A. to this act annexed, marked No. 2, the plaintiff shall issue a writ of summons according to the form contained in the said Schedule A., marked No. 3, and shall in manner aforesaid serve a notice of such last-mentioned writ upon the defendant therein mentioned, which notice shall be in the form contained in the said schedule also marked No. 3; and such service shall be of the same force and effect as the service of the writ of summons in any action against a British subject resident abroad, and, by leave of the court or a judge, upon their or his being satisfied by affidavit as aforesaid, the like proceedings may be had and taken thereupon.* As to actions against foreigners residing out of the jurisdiction of the Superior Courts.

The procedure under this section is precisely the same as that

* If, therefore, a foreigner be resident in Scotland or Ireland, a writ may be issued against him, and served in either country, the exceptive words of s. 18 (*ante*, p. 16) not being introduced into this section.

under s. 18 (*ante*, p. 16), only that the affidavit of service should specify the service of the "notice" instead of the "copy" of the writ.

As to the effect of not following the form given by this section, vide *post*, Sched. A., Form 3.

In an action against a foreigner resident abroad, where leave had been given by a judge to proceed against him as if personal service had been effected, upon an affidavit of a cause of action for work and labour arising in this country, the plaintiff, upon a rule obtained by the defendant to show cause why that order should not be rescinded, made an affidavit that orders were given in this country by certain persons who were afterwards recognized by the defendant, in certain conversations abroad, as his agents; and it was thereupon held, that, although this was denied by the defendant, there was sufficient evidence to satisfy a judge of a cause of action within the jurisdiction, and the defendant's rule was accordingly discharged (*Glover* v. *Persigny*, 11 W. R. 146, Q. B, M. T. 1862).

As to endorsing the time of service (under s. 15), as in the case of an ordinary writ of summons, see *ante*, p. 10.

This section does not apply to foreign corporations (*Ingate* v. *Austrian Lloyd's*, 4 C. B., N. S. 704; L. J. 27, C. P. 323).

Omission to insert or indorse matters in or on writ not to nullify it.

20. If the plaintiff or his attorney shall omit to insert in or endorse on any writ or copy thereof any of the matters required by this act to be inserted therein or endorsed thereon, such writ or copy thereof shall not on that account be held void, but it may be set aside as irregular, or amended, upon application to be made to the court out of which the same shall issue, or to a judge; and such amendment may be made, upon any application to set aside the writ, upon such terms as to the court or judge may seem fit.

Amendment to save the Statute of Limitations.

The rule upon which the courts formerly acted in the amendment of the writ is laid down in *Goodchild* v. *Leadham* (1 Exch. 707). They amended where the action would otherwise be barred by the Statute of Limitations, or where the writ itself varied from the *præcipe*. In *Brown* v. *Fullerton* (13 M. & W. 556), a plaintiff was added; and in *Christie* v. *Bell* (16 M. & W. 669), the character of the plaintiffs and defendants was added, in both cases, to save the statute. See also *Carne* v. *Malins* (6 Exch. 803). In *Kirk* v. *Dolby* (6 M. & W. 636), the date of the writ was altered to make it correspond with the *præcipe*; see also *Williams* v. *Williams* (10 M. & W. 476); *Mavor* v. *Spalding* (1 D. & L. 878); *Culverwell* v. *Nugee* (15 M. & W. 559); but the date will not be altered to save the statute, as the writ must bear the true date of its issue (*Campbell* v. *Smart*, 5 C. B. 196; *Bailey* v. *Owen*, 9 W. R. 128, B. C., M. T. 1860, *cor.* Crompton, J.), unless it be to make it agree with the *præcipe* (*Clarke* v. *Smith*, 2 H. & N. 753). In one case, before the Uniformity of Process Act (2 & 3 Will. 4, c. 39), a *capias* was amended by altering the name of the defendant (*Carr* v. *Shaw*, 7 T. R. 299); and in another case the christian names of two defendants were inserted (*Rutherford* v. *Mein*, 2 Smith, 392).

The courts formerly decided that they would not allow an

amendment by the addition of a defendant (*Goodchild* v. *Leadham*, *supra*; *Roberts* v. *Bate*, 6 A. & E. 778). Nor does this section enable them to do so, though the name of a defendant may be added after a plea in abatement (s. 35, *post*, p. 41).

Amendment of copy.

The courts formerly refused to amend the copy of the writ, for this is the act of the party (*Eccles* v. *Cole*, 8 M. & W. 537). The power of amending the *copy* of the writ is here expressly given. Misnomers were formerly amended by judge's order, "at the cost of the plaintiffs" (*Rush* v. *Kennedy*, 7 Dowl. 199). The court or a judge may amend now, "upon such terms as may seem fit;" generally at the cost of the plaintiff; but see ss. 21, 222 (*post*).

Application to set aside the writ.

The application to set aside the writ may be made either to the court in term, or to a judge at chambers. It ought to be made within a reasonable time, ordinarily within the time allowed for appearing (*Tilling* v. *Hodgson*, 13 M. & W. 638); and it must be made before taking a fresh step, after knowledge of the irregularity (R. G., H. T. 1853, r. 135, *post*). As to what will constitute "irregularity" in the writ, see ss. 2, 4, 5, 6, 7, 8 (*ante*, pp. 1—6). It is not strictly necessary to state the irregularity on which the party relies in applying for a rule *nisi*. It is sufficient if it appears upon the affidavit on which the rule is applied for (*Rennie* v. *Bruce*, 2 D. & L. 946). In the case of a summons at chambers, it is necessary (R. G., H. T. 1853, r. 136, *post*); because that is commonly taken out without filing any affidavit, so that the opposite party might be in entire ignorance of what he was called upon to answer, if it were not so stated (*Rennie* v. *Bruce*, *ubi supra*).

Notice of application.

If an application to set aside the writ be made to the court, a two days' notice of motion should be given, in order that the rule nisi may stay proceedings (R. G., H. T. 1853, r. 160, *post*).

Upon the hearing, the court or judge may order that the plaintiff be at liberty to amend the summons and copy (see s. 222, *post*), stating the terms, if terms be put on the plaintiff as to costs, or the defendant's pleading.

Substitution by mistake or inadvertence of one form of writ for another may be amended by judge without costs.

21. If either of the forms of writ of summons contained in the Schedule A. to this act annexed, and marked respectively Nos. 1, 2 and 3, shall by mistake or inadvertence be substituted for any other of them, such mistake or inadvertence shall not be an objection to the writ or any other proceeding in such action, but the writ may, upon an *ex parte* application to a judge, whether before or after any application to set aside such writ or any proceeding thereon, and whether the same or notice thereof shall have been served or not, be amended by such judge without costs.

(*Green* v. *Braddyl*, 4 W. R. 487, Ex., E. T. 1855.)

Writs for service within and without jurisdiction may be concurrent and vice versâ.

22. A writ for service within the jurisdiction may be issued and marked as a concurrent writ with one for service out of the jurisdiction, and a writ for service out of the jurisdiction may be issued and marked as a concurrent writ with one for service within the jurisdiction.

Affidavits in certain cases may be sworn before a consul.

23. Any affidavit for the purpose of enabling the court or a judge to direct proceedings to be taken against a defendant residing out of the jurisdiction of the said courts may be sworn before any consul-general, consul, vice-consul or consular agent for the time being, appointed by her Majesty at any foreign port or place; and every affidavit so sworn by virtue of this act may be used and shall be admitted in evidence, saving all just exceptions, provided it purport to be signed by such consul-general, consul, vice-consul or consular agent, upon proof of the official character and signature of the person appearing to have signed the same: provided always, that if any person shall forge the signature of any such affidavit, or shall use or tender in evidence any such affidavit, with a false or counterfeit signature thereto, knowing the same to be false or counterfeit, he shall be guilty of felony, and shall upon conviction be liable to transportation for seven years, or to imprisonment for any term not exceeding three years, nor less than one year, with hard labour; and every person who shall be charged with committing any felony under this act may be dealt with, indicted, tried, and, if convicted, sentenced, and his offence may be laid and charged to have been committed in the county or place in which he shall be apprehended or be in custody; and every accessory before or after the fact to any such offence may be dealt with, indicted, tried, and, if convicted, sentenced, and his offence may be laid and charged to have been committed in any county or place in which the principal offender may be tried: provided also, that if any person shall wilfully and corruptly make a false affidavit before such consul-general, consul, vice-consul or consular agent, every person so offending shall be deemed and taken to be guilty of perjury, in like manner, as if such false affidavit had been made in England before competent authority, and shall and may be dealt with, indicted, tried, and, if convicted, sentenced, and his offence may be laid and charged to have been committed in any county or place in which he shall be apprehended or be in custody, as if his offence had been actually committed in that county or place.

Forgery of a signature to be felony.

See also the 18 & 19 Vict. c. 42, cited *supra*, pp. 24, 25.

The affidavit of service, as taken before a consul-general, was by this section only to be admitted upon proof of the official character and signature of the person appearing to have signed the same; but that proof is now unnecessary under the 3rd sect. of the last-mentioned act.

Affidavits of service in countries where there are no diplomatic or consular officers should be sworn before some person having by the law of the country authority to administer oaths. See hereon, *ante*, p. 24.

In the jurat of the affidavit of service, it will be proper to state the official character of the person before whom it is sworn, and the *place* must be specially stated (*ante*, p. 25).

Distringas to compel appearance or to proceed to outlawry abolished.

24. From the time when this act shall commence and take effect, so much of the said act of his late Majesty King William the Fourth as relates to the writ of distringas, and the proceeding thereon, whether for the purpose of compelling appearance or for proceedings to outlawry, shall be repealed, except so far as may be necessary for the purpose of giving effect to proceedings already taken, or to be taken after the commencement of this act, under or by reason of any writ of distringas issued before the commencement of this act, or under any rule or order authorizing the issuing of such writ, and made before the commencement of this act.

This section abolished outlawry on *mesne*, but not on final, process.

Special endorsement of the particulars of debts or liquidated demands may be made on the writ.

25. In all cases where the defendant resides within the jurisdiction of the court, and the claim is for a debt or liquidated demand in money, with or without interest, arising upon a contract, express or implied, as, for instance, on a bill of exchange, promissory note or cheque, or other simple contract debt, or on a bond or contract under seal for payment of a liquidated amount of money, or on a statute where the sum sought to be recovered is a fixed sum of money, or in the nature of a debt, or on a guarantee, whether under seal or not, where the claim against the principal is in respect of such debt or liquidated demand, bill, cheque or note, the plaintiff shall be at liberty to make upon the writ of summons and copy thereof a special endorsement of the particulars of his claim, in the form contained in the Schedule (A.) to this act annexed, marked No. 4, or to the like effect; and when a writ of summons has been endorsed in the special form hereinbefore mentioned, the endorsement shall be considered as particulars of demand, and no further or other particulars of demand need be delivered, unless ordered by the court or a judge.

Special endorsement to stand for particulars of demand.

This proceeding is only applicable upon writs for service *within* the jurisdiction.

A judgment debt may be endorsed under this section (*Hodsoll* v. *Baxter, in error*, E. B. & E. 884; L. J. 28, Q. B. 61).

Interest must not be endorsed, unless payable under an express contract to that effect, or upon bills of exchange or promissory notes; and any attempt thus to obtain interest in other cases will be severely dealt with by the courts (*Rodway* v. *Lucas*, 10 Exch. 667).

The expenses of noting a bill of exchange can only be endorsed upon writs issued under "The Summary Procedure on Bills of Exchange Act, 1855," *post* (*Roper* v. *Hunt*, 10 Exch. 474).

It is irregular to deliver, without leave of a judge, different particulars from those endorsed; but if delivered and not set aside, the plaintiff may use them at the trial (*Fromant* v. *Ashley*, 1 E. & B. 723).

By Pl. R., T. T. 1853, r. 13 (*post*), payment need not be pleaded where credited in the particulars of demand; but this rule does not apply where the plaintiff, seeking to recover a balance, does not state the particular sums credited. The plaintiff, in endorsing his writ, should have this rule in view, so as to avoid the costs of a successful plea of payment.

As to judgment by default, when the writ is specially endorsed, see s. 27 (*infra*). As to the costs of the declaration, if there be no special endorsement, see s. 28 (*post*, p. 34). It is only when the defendant resides within the jurisdiction that final judgment on default is obtainable.

Appearance.

Appearance, and Proceedings in default of Appearance.

And with respect to the appearance of the defendant, and proceedings of the plaintiff in default of appearance, be it enacted as follows:—

Appearance according to provisions of acts of 12 Geo. 1, c. 29, and 2 Will. 4, c. 39, abolished.

26. From the time when this act shall commence and take effect, so much of a certain act of parliament passed in the twelfth year of the reign of his late Majesty King George the First, intituled "An Act to prevent frivolous and vexatious Arrests," and so much of the said act of his late Majesty King William the Fourth as relates to the entering an appearance for the defendant by the plaintiff in any action in any of the said Superior Courts, shall be repealed, except so far as may be necessary to support proceedings heretofore taken, and no appearance need be entered by the plaintiff for the defendant.

It is, however, still necessary to appoint a guardian *ad litem*, and enter an appearance for an infant defendant before signing judgment by default, and if this course be not followed, the court will set aside all the proceedings (*Jarman* v. *Lucas*, 15 C. B., N. S. 474; L. J. 33, C. P. 108).

Final judgment upon writ specially endorsed in

27. In case of non-appearance by the defendant where the writ of summons is endorsed in the special form hereinbefore provided, it shall and may be lawful

for the plaintiff, on filing an affidavit of personal service of the writ of summons, or a judge's order for leave to proceed under the provisions of this act, and a copy of the writ of summons, at once to sign final judgment in the form contained in the Schedule (A.) to this act annexed, marked No. 5 (on which judgment no proceeding in error shall lie), for any sum not exceeding the sum endorsed on the writ, together with interest at the rate specified, if any, to the date of the judgment, and a sum for costs (to be fixed by the Masters of the said Superior Courts, or any three of them, subject to the approval of the judges thereof, or any eight of them, of whom the Lord Chief Justices and the Lord Chief Baron shall be three), unless the plaintiff claim more than such fixed sum, in which case the costs shall be taxed in the ordinary way: and the plaintiff may upon such judgment issue execution at the expiration of eight days from the last day for appearance and not before: provided always, that it shall be lawful for the court or a judge, either before or after final judgment, to let in the defendant to defend upon an application, supported by satisfactory affidavits accounting for the non-appearance, and disclosing a defence upon the merits. *default of appearance.*

The final judgment under this section is only to be obtained in cases where the writ of summons is specially endorsed under s. 25 (*ante*, p. 31). The writ must either have been served personally, or leave obtained to proceed as if personal service had been effected under s. 17 (*ante*, p. 11). In the former case the affidavit of personal service, in the latter the judge's order, must be filed on signing judgment.

The judge's order, giving the plaintiff leave to proceed as if personal service had been effected, usually requires that the order should be served on the defendant at his supposed residence, or as the judge may direct, three days before the plaintiff takes any further proceedings in the action. The eight days for appearance run from the day when the writ is shown to have come to the knowledge of the defendant, and in the case of a specially endorsed writ execution may issue at the expiration of other eight days thereafter, if the three days limited by the judge's order have then elapsed.

Costs. The costs for which judgment may be thus signed are fixed by R. G., H. T. 1853, r. 1 (*post*).

Setting aside. In order to set aside a judgment under this section, it is necessary to *disclose* merits, and it is not sufficient to swear to them generally, as in a common affidavit of merits (*Whiley* v. *Whiley*, 4 C. B., N. S. 653, overruling upon this point *Warrington* v. *Leake*, 11 Exch. 304). But the truth of the facts alleged will not be further inquired into upon the application by admitting affidavits in reply (*Warrington* v. *Leake*, *supra*).

Where the last of the eight days from the last day for appearance fell on a Sunday, it was held, that execution might be

issued on the Monday, and that R. G., H. T. 1853, r. 174 (*post*), did not apply (*Rowberry* v. *Morgan*, 9 Exch. 730; L. J. 23, Ex. 191); see note thereon, *post*.

A judgment will be set aside under this section, where any claim is endorsed upon the writ that is not properly endorsable under s. 25, if the judgment be signed for such claim (see *Rogers* v. *Hunt* and *Rodway* v. *Lucas*, *ubi supra*). The general equitable powers of the courts over judgments are not curtailed by the affirmative language of this section (see *Hall* v. *Scotson*, 9 Exch. 238; L. J. 23, Ex. 85).

Affidavit of merits.

The defendant may be let in to defend after judgment signed upon an affidavit of merits. It has long been the practice to let in a defendant to defend on merits (*Listed* v. *Lee*, 1 Salk. 402); but the defence must be on *the merits*. Pleas of the Statute of Limitations (*Maddock* v. *Holmes*, 1 B. & P. 228), of bankruptcy (*Evans* v. *Gill*, 1 B. & P. 52), or infancy (*Delafield* v. *Tanner*, 5 Taunt. 856), are defences on the merits within this rule. A plea to an attorney's action that no bill was delivered was, in *Beck* v. *Mordaunt* (4 Dowl. 112), held not to be a plea to the merits; but in *Wilkinson* v. *Page* (1 D. & L. 913), Tindal, C. J., expressed an opinion to a different effect.

The defendant must also account in some way for not having entered an appearance.

The defendant must generally pay the costs of the application (*Listed* v. *Lee*, *ubi supra*), and plead issuably without delay. Sometimes he may be ordered to bring money into court (see *Wade* v. *Simeon*, 13 M. & W. 637).

The affidavit may be made, not only by the defendant, if *he is advised* and believes, but by the attorney or his clerk, if he has been *informed* or *instructed*, and believes; or by an agent, if he state that *from his instructions* he believes (*Rowbotham* v. *Dupree*, 5 Dowl. 557; *Schofield* v. *Huggins*, 3 Dowl. 427: see observations upon swearing "on information and belief" in *Arndt* v. *Porter*, L. J. 30, Ex. 19). The affidavit must show the merits to be *merits to the action* (*Bromley* v. *Gerish*, 1 D. & L. 768; see further *Tate* v. *Bodfield*, 3 Dowl. 218; *Bower* v. *Kemp*, 1 Dowl. 282; *Page* v. *South*, 7 Dowl. 412; *Crossby* v. *Innes*, 5 Dowl. 566).

Judgment for non-appearance where the writ is not endorsed in the special form.

28. In case of such non-appearance, where the writ of summons is not endorsed in the special form hereinbefore provided, it shall and may be lawful for the plaintiff, on filing an affidavit of personal service of the writ of summons, or a judge's order for leave to proceed under the provisions of this act, and a copy of the writ of summons, to file a declaration endorsed with a notice to plead in eight days, and to sign judgment by default at the expiration of the time to plead, so endorsed as aforesaid; and in the event of no plea being delivered, where the cause of action mentioned in the declaration is for any of the claims which might have been inserted in the special endorsement on the writ of summons hereinbefore provided, and the amount claimed is endorsed on the writ of summons, the judgment shall be final, and execution may issue

for an amount not exceeding the amount endorsed on the writ of summons, with interest at the rate specified, if any, and the sum fixed by the Masters for costs, as hereinbefore mentioned, unless the plaintiff claim more, in which case the costs shall be taxed in the ordinary way: provided always, that in such case the plaintiff should not be entitled to more costs than if he had made such special endorsement, and signed judgment upon non-appearance.

If a writ is not specially endorsed under s. 25 (*ante*, p. 31), when it might have been so, the plaintiff is not entitled to the costs of the declaration, so far as that expense exceeds the costs under s. 27 (*ante*, p. 31). In cases where the writ cannot be so endorsed, he may recover these costs.

As to the affidavit of personal service and judge's order, see s. 17, n. (*ante*, p. 11, *et seq.*).

Appearance to be entered at any time before judgment.

29. The defendant may appear at any time before judgment, and if he appear after the time specified either in the writ of summons, or in any rule or order to proceed as if personal service had been effected, he shall, after notice of such appearance to the plaintiff or his attorney, as the case may be, be in the same position as to pleadings and other proceedings in the action as if he had appeared in time: provided always, that a defendant appearing after the time appointed by the writ shall not be entitled to any further time for pleading or any other proceeding than if he had appeared within such appointed time.

If the defendant does not appear, the plaintiff may proceed against him under ss. 27 or 28 (*ante*, pp. 33, 34); if he does appear, the appearance must be in the form prescribed by s. 31 (*post*, p. 36); and if a defendant appear in person, he must give the address required by s. 30, *infra*. Appearances entered under the old practice were set aside as irregular where they did not follow the requirements of the statute then in force (*Smith* v. *Wedderburn*, 4 D. & L. 297, and cases there cited). If the defendant is described in the writ by initials, or by a wrong name, the appearance should be entered in his true name, as thus, "William Wells Kilpin, sued as W. W. Kilpin" (*Lomax* v. *Kilpin*, 4 D. & L. 295). If an appearance be entered which is wrong or irregular, it ought to be amended; a new appearance would be irregular (*Bate* v. *Bolton*, 4 Dowl. 160, 677).

If two or more defendants in the same action appear by one attorney at the same time, their names are to be inserted in one appearance (R. G., H. T. 1853, r. 2, *post*).

Entry of appearance after time allowed.

If the defendant has not entered an appearance within the eight days allowed for so doing, he must, in order to be in the same position as if he had appeared in time, give notice to the plaintiff of such his appearance; and see *Rhodes* v. *Bryant*, 2 P. & P. 265 (Willes, J.).

An appearance *in person* must be stated to be so (s. 31, *post*, p. 36).

An infant can only appear by *guardian* (Co. Litt. 135 b; *Frescobaldi* v. *Kynaston*, 2 Str. 784; *Leech* v. *Cladburn*, 2 L. M. & P. 614; *Jarman* v. *Lucas*, 15 C. B., N. S. 474; L. J. 33, C. P. 108; cited *ante*, s. 26, n., p. 32) he cannot appear by *prochein amy* (2 Inst. 261; *Fitzgerald* v. *Villiers*, 3 Mod. 236; *Simpson* v. *Jackson*, Cro. Jac. 640). An infant may sue by *guardian* or by *prochein amy* admitted by the court for that purpose, but he cannot sue in person or by attorney. See as to the appointment of guardians *ad litem* and generally, Chitt. Pr. 12th ed. vol. ii. pp. 1240—1246. See also as to insolvency of *prochein amy*, *Lees* v. *Smith* (5 H. & N. 632; L. J. 29, Ex. 294); and as to right of infant to monies recovered in suit as against the attorney employed by the *prochein amy*, *Collins* v. *Brook* (*in error*), (5 H. & N. 700; L. J. 29, Ex. 255.)

Should the time for pleading have expired, or nearly expired, the defendant should give notice of his appearance to the plaintiff's attorney (s. 29), and apply to a judge for further time to plead.

Appearance by the defendant in person to give an address at which proceedings may be served.

30. Every appearance by the defendant in person shall give an address, at which it shall be sufficient to leave all pleadings and other proceedings not requiring personal service; and if such address be not given the appearance shall not be received; and if an address so given shall be illusory or fictitious, the appearance shall be irregular, and may be set aside by the court or a judge, and the plaintiff may be permitted to proceed by sticking up the proceedings in the Master's office without further service.

A book for the purpose of entering appearances, &c., is kept at the master's office. The address given must be within three miles from the General Post-office. (R. G., H. T. 1853, r. 166, *post*).

The reason of the latter provision of the above section seems to be, that the appearance shows the defendant to be aware of the proceedings, and to be watching their course. Leave to stick up the proceedings must be obtained from the court or a judge (R. G., H. T. 1853, r. 162, *post*). In order to obtain such leave, the plaintiff should show by affidavit that proper and sufficient inquiries have been made for the defendant. One visit to his residence, accompanied by inquiries in the neighbourhood, was not considered sufficient (*Fry* v. *Rogers*, 2 Dowl. 412); nor were inquiries at a public office, where the bill sued on was payable (*Hemming* v. *Duke*, 2 Dowl. 637). The particulars of the inquiries should be stated, and the application should generally be made to a judge at chambers *ex parte*, a rule of court under the old practice having been in such a case absolute in the first instance (*Bridges* v. *Austin*, 1 Dowl. 272).

The application to proceed under s. 30 should follow the language of the section, and the rule or order be drawn up in similar terms.

Mode of ap-

31. The mode of appearance to every such writ of

summons, or under the authority of this act, shall be by delivering a memorandum in writing according to the following form, or to the like effect: Appearance to writ of summons.

"*A.*, plaintiff, against *C. D.*, *or* against *C. D.* and another, *or* against *C. D.* and others. { The defendant, *C. D.*, appears in person. / *E. F.*, attorney for *C. D.*, appears for him.

[*If the defendant appears in person, here give his address.*]

Entered the day of , 18 ."

Such memorandum to be delivered to the proper officer or person in that behalf, and to be dated on the day of the delivery thereof.

See R. G., H. T. 1853, rr. 2, 166, *post.*

32. All such proceedings as are mentioned in any writ or notice issued under this act shall and may be had and taken in default of a defendant's appearance. Proceedings mentioned in writ or notice may be had and taken.

This, of course, does not give validity to proceedings mentioned indeed in writs or notices, but not sanctioned by the act.

33. In any action brought against two or more defendants, where the writ of summons is endorsed in the special form hereinbefore provided, if one or more of such defendants only shall appear, and another or others of them shall not appear, it shall and may be lawful for the plaintiff to sign judgment against such defendant or defendants only as shall not have appeared, and, before declaration against the other defendant or defendants, to issue execution thereupon, in which case he shall be taken to have abandoned his action against the defendant or defendants, who shall have appeared; or the plaintiff may, before issuing such execution, declare against such defendant or defendants as shall have appeared, stating, by way of suggestion, the judgment obtained against the other defendant or defendants who shall not have appeared, in which case the judgment so obtained against the defendant or defendants who shall not have appeared shall operate and take effect in like manner as a judg- Proceedings where only some of the defendants appear to a writ specially endorsed.

ment by default obtained before the commencement of this act against one or more of the several defendants in an action of debt before the commencement of this act.

The special endorsement under s. 25 (*ante*, p. 31), is confined to writs issued in actions *ex contractu*. In actions of this nature a plea by one defendant (with one or two exceptions) is for the benefit of all; it goes to the contract alleged in the declaration, so that if one defendant succeed in his plea, a judgment by default against the others goes for nothing, the plaintiff having failed to make out a joint liability (*Morgan* v. *Edwards*, 6 Taunt. 398). So a plaintiff, where he has signed judgment by default against one or more of several defendants in such actions, cannot be non-suited; but if he fails the defendant must have a verdict (*Hannay* v. *Smith*, 3 T. R. 662).

If, therefore, there be no appearance for one or more of several defendants, the plaintiff has two courses to follow. He may abandon his action against him or those who appear, and issue execution against those who suffer judgment; or he may go on to declare against him or those who appear, with the risk of having a worthless judgment if he ultimately fail in his action. As to costs, see *Morgan* v. *Edwards* (6 Taunt. 398).

Joinder of Parties.

And with respect to the joinder of parties to actions, be it enacted as follows:—

Nonjoinder and misjoinder of plaintiffs may be amended before trial.

34. It shall and may be lawful for the court or a judge, at any time before the trial of any cause, to order that any person or persons, not joined as plaintiff or plaintiffs in such cause shall be so joined; or that any person or persons, originally joined as plaintiff or plaintiffs, shall be struck out from such cause, if it shall appear to such court or judge that injustice will not be done by such amendment, and that the person or persons to be added as aforesaid consent, either in person or by writing, under his, her or their hands, to be so joined, or that the person or persons to be struck out as aforesaid were originally introduced without his, her or their consent, or that such person or persons consent in manner aforesaid to be so struck out; and such amendment shall be made upon such terms as to the amendment of the pleadings (if any), postponement of the trial, and otherwise, as the court or judge by whom such amendment is made shall think proper; and when any such amendment shall have been made, the liability of any person or persons who shall have been added as co-plaintiff or co-plaintiffs shall, subject to any terms imposed as

aforesaid, be the same as if such person or persons had been originally joined in such cause.

Although it may be doubted whether this and the next following section apply to actions of ejectment, yet their object may be attained in such actions by amendment under sect. 222, *post* (*Blake* v. *Done*, 7 H. & N. 465).

Nonjoinder of plaintiffs in contract.

The omission in actions on *contract* of a party as plaintiff is fatal, except, indeed, in the case of executors (*Jones* v. *Smith*, 1 Exch. 831, where the cases are collected); see also *Agacio* v. *Forbes* (14 Moore, P. C. C. 160). If the objection appears on the pleadings, it may be taken advantage of by demurrer or by motion in arrest of judgment, or by error; but if it does not appear upon the pleadings, and arises upon the trial by way of variance between the contract declared upon and that proved, it would, unless amended, lead to a nonsuit or to an adverse verdict (*Chanter* v. *Leese*, 4 M. & W. 295). But the nonjoinder may be remedied under the above section at any time *before* the trial, or, under the following sections, even, *at* the trial, unless notice of objection to the nonjoinder has been given before or with the plea. If such notice of objection be given, or if a plea in abatement be pleaded (now a very unusual course since the notice introduced by this act answers the same purpose, and need not be delivered, as a plea in abatement must, within four days after delivery of the declaration, and need not be verified by affidavit as a plea in abatement must), the plaintiff may, under s. 36 (*post*, p. 43), amend without order upon payment of the costs of and occasioned by the amendment, and upon filing a consent in writing (unless specially dispensed with) of the parties added, verified by affidavit of their handwriting, and giving notice to the defendant (R. G., H. T. 1853, r. 6, *post*), who may then plead *de novo*.

Nonjoinder of plaintiffs in tort.

In actions on *tort* the nonjoinder of parties who are jointly wronged can only be taken advantage of by notice or plea in abatement as above (*Addison* v. *Overend*, 6 T. R. 766; *Broadbent* v. *Ledward*, 11 A. & E. 209; *Phillips* v. *Claggett*, 10 M. & W. 102); if neither of those steps be taken, the plaintiff will be entitled to recover his share only of the damages sustained (*Sedgworth* v. *Overend*, 7 T. R. 279; *Bloxham* v. *Hubbard*, 5 East, 407).

Misjoinder of plaintiffs generally.

This, which was formerly a fatal objection unless amended, is so no longer since the Common Law Procedure Act, 1860, s. 19 (which see, *post*), and it is now reduced to a matter of mere costs; unless such misjoinder be inconsistent with the alleged cause of action, when it necessarily constitutes a fatal objection (*Bellingham* v. *Clarke*, 1 B. & S. 332).

Nonjoinder of defendants in contract.

This is not a fatal objection, and can only be taken advantage of by plea in abatement (*Rice* v. *Shute*, 5 Burr. 2613), which can only be pleaded when the alleged co-defendant is within the jurisdiction; and which, as above stated, must be pleaded within four days from the delivery or filing of the declaration, and must be verified by affidavit (see *infra*). It must be borne in mind that a judgment recovered against one of several *joint* debtors is a good plea in bar to an action against another of them in respect of the *joint* as distinguished from the *several* liability (if any) (*King* v. *Hoare*, 13 M. & W. 494). But, by reason of s. 11 of the Mercantile Law Amendment Act, 1856 (*post*), a judgment recovered against one or more joint debtors not beyond seas when

the cause of action accrued is not now a bar to a subsequent action against the joint debtor or debtors who were beyond seas when the cause of action accrued.

Nonjoinder of defendants in tort. This is no ground of objection; each of several who jointly commit a wrong is separately liable for the whole wrong done (*Sutton* v. *Clarke*, 6 Taunt. 29; and see *Reg.* v. *Brown*, 7 E. & B. 757).

Misjoinder of defendants in contract. This is fatal, unless amended *before verdict* (*Robson* v. *Doyle*, 3 E. & B. 396; *Wickens* v. *Steel*, 2 C. B., N. S. 488). See s. 37, n. (*post*, p. 44).

Misjoinder of defendants in tort. This merely entitles the party wrongly joined to a verdict and his costs, but does not affect the liability of the real wrong-doer (*Govett* v. *Radnidge*, 3 East, 62; *Bretherton* v. *Wood*, 3 B. & B. 54; *Pozzi* v. *Shipton*, 8 A. & E. 963; *Morrow* v. *Belcher*, 4 B. & C. 704).

Pleas in abatement. A plea in abatement should mention *all* the co-defendants not joined, so that the plaintiff may have a better writ, otherwise, if the plaintiff take issue on the plea, he will succeed (*Crellin* v. *Calvert*, 14 M. & W. 11). So if any one of the co-contractors is not resident within the jurisdiction, this plea cannot be pleaded successfully (*Joll* v. *Curzon*, 4 C. B. 249).

Upon a plea in abatement for nonjoinder, the plaintiff (if the plea is well founded, or if it is doubtful whether it is well founded or not) ought to amend the writ, (which he may do without any order,) serve the amended writ on the persons thus added as defendants, and declare *de novo*. In such case the new declaration must commence in a special form (s. 60, *post*, p. 62). As to the costs of the plea, see ss. 39, 60 (*post*, pp. 45, 63); or he may enter a *cassetur breve*,* and thus evade payment of any costs to the defendant, and abandon his present action. If the plaintiff amend, by inserting the names of the additional defendants mentioned in the plea, the *date* of such amendment will, *as to them*, be the commencement of the action, the object of this provision being to save the rights of these defendants, if it should happen, that, to the plaintiff's claim, the Statute of Limitations is pleadable by them; for if a defendant in any action on simple contract pleads in abatement that any other person ought to be jointly sued, and issue be joined on such plea, and it appears at the trial that the action could not, by reason of the Statute of Limitations, be maintained against the other person named in such plea, the issue is to be found against the party pleading the same (9 Geo. 4, c. 14, s. 2).

The plea must state the persons not joined to be still living (1 Saund. 291), and to be residing within the jurisdiction of the court (3 & 4 Will. 4, c. 42, s. 8).

It must be verified by affidavit (4 & 5 Anne, c. 16, s. 11), setting out their place of residence as distinguished from that of mere business (3 & 4 Will. 4, c. 42, s. 8; *Mayburg* v. *Mudie*, 5 C. B. 283). The affidavit must be delivered with the plea, unless an extension of time be granted (*Johnson* v. *Popplewell*, 2 Tyrw. 717).

The title of the affidavit must be strictly accurate in the names of the parties (*Poole* v. *Pembrey*, 1 Dowl. 692; *Fletcher* v. *Lechmere*, 2 Dowl. N. S. 848). The verification must be absolute,

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* See as to *cassetur breve*, sect. 60, n. (*post*, p. 63).

and the words "is true in substance and fact" are essential, so as to make the affidavit precise (*Onslow* v. *Booth*, Str. 705). If the affidavit is insufficient, the plea may be treated as a nullity (*Bray* v. *Halter*, 2 B. Moore, 213; *Garrett* v. *Hooper*, 1 Dowl. 28), and the plaintiff may sign judgment (*Lovell* v. *Walker*, 8 M. & W. 299). See further as to the requisites of this affidavit, notes to s. 36 (*post*, p. 43). As to the statement of the residence of the party not joined as a defendant, see also *Wheatley* v. *Golney* (9 Dowl. 1019); *Lambe* v. *Smythe* (15 M. & W. 433); *Newton* v. *Stewart* (4 D. & L. 89); *White* v. *Gascoigne* (3 Exch. 36); *Maybury* v. *Mudie* (*ubi supra*).

A plea in abatement must be pleaded within *four* days after declaration (*Ryland* v. *Wormwald*, 5 Dowl. 581).

As to pleading *de novo* after amendment, see s. 90 (*post*, p. 85).

The replication to the plea, it would seem, may be a "joinder of issue," under s. 79 (*post*, p. 77); see also s. 38, n. (*post*, p. 34).

Upon issue taken on a plea in abatement, the plaintiff must be prepared to prove his demand, or he will not recover (*Welcher* v. *Le Pelletier*, 1 Camp. 481).

Pleas of coverture.

Under this section may be noticed pleas in abatement of coverture of the plaintiff or defendant,—rarely pleaded however.

These pleas are not within 3 & 4 Will. 4, c. 42, s. 8, and therefore do not require an affidavit of the husband's residence (*Jones* v. *Smith*, 3 M. & W. 526); but as dilatory pleas, within 4 Anne, c. 16, s. 11, they require an affidavit of verification.

If a wife succeed on this plea, she may sue out execution in her own name (*Wortley* v. *Rayner*, Doug. 637). When pleaded by a wife, she must plead it in person (2 Saund. 209, n.).

Other pleas in abatement are to the jurisdiction; or the *pendency* of another action for the same cause in one of the *Superior* Courts.

Application to amend.

The application to amend should be to amend the writ and copy, as well as the declaration and subsequent proceedings, if any (see s. 36, *post*, p. 43).

Amendments are generally ordered upon terms of payment of costs of application and of the costs occasioned by the amendment. The court or a judge exercises a discretion in allowing costs (*Wall* v. *Lyon*, 1 Dowl. 714). It has been held that the judge may, on hearing an application at chambers, fix the amount of costs at once (*Collins* v. *Aaron*, 6 Dowl. 423), and this is very frequently done. Some judges, in order to avoid interlocutory taxation, direct the costs to be the costs of the party (not amending) in the cause *in any event*; and this, which is a growing, is generally the most beneficial practice. But it may be doubted whether costs so ordered become payable at all, in cases where a juror is withdrawn, or some settlement is come to apart from the ordinary *event* of an action.

Pleading after amendment.

The defendant ought, if possible, to get inserted in the order for amendment the terms on which he is to plead. If he had already pleaded, the plea, under the old practice, would have been considered as a plea to the amended declaration (*Fagg* v. *Bersley*, 2 Dowl. 107), and is so still, unless he pleads *de novo* (s. 90, *post*). It was different in the case of a demurrer (*Smith* v. *Kearne*, 1 D. & L. 992). The defendant has now two days to plead *de novo* after the amendment, unless it is otherwise ordered. If the declaration is amended before plea, the defendant must still plead within the time limited to do so or within the two days, unless it is otherwise ordered (s. 90, *post*, p. 84).

A summons to amend operates as a stay of proceedings from the time when it is attendable (*Hodson* v. *Cayley*, 8 Dowl. 318; *Morris* v. *Hunt*, 2 B. & A. 355); and the time to plead given by an order on amendment counts from the day of the amendment and not from the date of the order (*Davis* v. *Stanley*, 8 Dowl. 433).

See notes to following sections.

Nonjoinder and misjoinder of plaintiffs may be amended at the trial, as in cases of amendments of variances under 3 & 4 Will. 4, c. 42.

35. In case it shall appear at the trial of any action that there has been a misjoinder of plaintiffs, or that some person or persons, not joined as plaintiff or plaintiffs, ought to have been so joined, and the defendant shall not, at or before the time of pleading, have given notice in writing that he objects to such nonjoinder, specifying therein the name or names of such person or persons, such misjoinder or nonjoinder may be amended, as a variance, at the trial by any Court of Record holding plea in civil actions, and by any judge sitting at Nisi Prius, or other presiding officer, in like manner as to the mode of amendment, and proceedings consequent thereon, or as near thereto as the circumstances of the case will admit, as in the case of amendments of variances under an act of parliament passed in the session of parliament, held in the third and fourth years of the reign of his late Majesty King William the fourth, intituled "An Act for the further Amendment of the Law and the better Advancement of Justice," if it shall appear to such court, or judge, or other presiding officer, that such misjoinder, or nonjoinder was not for the purpose of obtaining an undue advantage, and that injustice will not be done by such amendment, and that the person or persons to be added as aforesaid consent, either in person or by writing under his, her or their hands, to be so joined, or that the person or persons, to be struck out as aforesaid, were originally introduced without his, her or their consent, or that such person or persons consent, in manner aforesaid, to be so struck out; and such amendment shall be made upon such terms as the court or judge, or other presiding officer, by whom such amendment is made, shall think proper; and when any such amendment shall have been made, the liability of any person or persons, who shall have been added as co-plaintiff or co-plaintiffs, shall, subject to any terms imposed as aforesaid, be the same as if such person or persons had been originally joined in such action.

Amendment at trial.

Under this section, the amendments referred to under s. 34 (*ante*, p. 38), may be made at the trial, as variances were formerly

amended under 3 & 4 Will. 4, c. 42, s. 23. The amendment must be made during the trial, and before verdict (*Brashier* v. *Jackson*, 8 Dowl. 784; *Robson* v. *Doyle*, 3 E. & B. 396; and see also *Wickens* v. *Steel*, 2 C. B., N. S. 488; but see *Roberts* v. *Snell*, 1 M. & G. 773; *Sergeant* v. *Chafy*, 6 Nev. & M. 819). The judge may refuse to amend, and if he do so, the remedy is to apply to the court for a new trial (*Whitwell* v. *Scheer*, 8 A. & E. 301), but the court will not interfere if the judge do not "plainly appear to have been wrong" (*Sainsbury* v. *Matthews*, 4 M. & W. 347); and, indeed, grave doubts exist as to the right or duty of the court to interfere with the exercise by the judge presiding at the trial of the discretionary power vested in him (see *Roles* v. *Davis*, 4 H. & N. 484; *Tennyson* v. *O'Brien*, 5 E. & B. 497; *Wilkin* v. *Reed*, 15 C. B. 192, and *Holden* v. *Ballantyne*, L. J. 29, Q. B. 148). The amendment ought to be made, so that no additional expense be thrown on the defendant; and if the defendant pays at once the sum claimed under the amended declaration, he will be entitled to his costs from the time he might have paid money into court; it is otherwise if he defends the action (*Smith* v. *Brandram*, 2 M. & G. 250). The terms on which the amendment will be allowed are in the discretion of the judge at the trial, whose decision will not be reviewed by the court (*Tomlinson* v. *Bollard*, 4 Q. B. 642).

An amendment under this section may be made, either where there has been a misjoinder of plaintiffs, or where some person or persons not joined as plaintiff or plaintiffs ought to have been so joined, and the defendant shall not, at or before the time of pleading, have given notice in writing that he objects to such nonjoinder. If, therefore, the defendant has given notice that he objects to the nonjoinder, the amendment cannot be made under this section, indeed, in such case, the plaintiff will generally have amended under s. 36, *infra*. It must appear that the misjoinder or nonjoinder was not for the purpose of obtaining an undue advantage, and that injustice will not be done by the amendment, a provision that would formerly have been of great importance when the evidence of the parties to the record was excluded. Willes, J., at Nisi Prius, expressed his readiness to amend by adding the name of a partner as plaintiff (*Williams* v. *Groves*, 1 F. & F. 341).

Endorsement of, on postea.

Sect. 23 of the 3 & 4 Will. 4, c. 42, requires that the order for the amendment shall be endorsed on the *postea* and returned with the record, and thereupon such papers, rolls and other records, &c., as it may be necessary to amend, shall be amended accordingly. Misjoinder and nonjoinder are under this section to be amended, "in like manner as to the mode of amendment and proceedings consequent thereon, &c.," as in the case of amendments under the 3 & 4 Will. 4, c. 42.

It would seem that the powers conferred by s. 222, *post*, do not apply to cases within this section (*Wickens* v. *Steel* and *Holden* v. *Ballantyne*, *ubi supra*).

See notes to sections 34, 36, 37 and 38 (pp. 38—45).

Upon notice or plea of nonjoinder of plaintiff, proceedings may be amended.

36. In case such notice be given, or any plea in abatement of nonjoinder of a person or persons as co-plaintiff or co-plaintiffs, in cases where such plea in abatement may be pleaded, be pleaded by the defendant, the plaintiff shall be at liberty, without any

order, to amend the writ and other proceedings before plea, by adding the name or names of the person or persons named in such notice or plea in abatement, and to proceed in the action without any further appearance, on payment of the costs of and occasioned by such amendment only, and in such case the defendant shall be at liberty to plead *de novo*.

Amendment of writ.

On receiving a notice or plea in abatement, the plaintiff may amend the writ, appearance and declaration; but the payment of the costs of and occasioned by the amendment being made a condition precedent to the amendment, the plaintiff should, therefore, have the costs of the defendant taxed, and pay or tender them to the defendant (unless the judge otherwise order, *ut supra*, p. 41), otherwise his proceeding in the action would be irregular (*Levy* v. *Drew*, 5 D. & L. 307).

And see R. G., H. T. 1853, r. 6 (*post*), as to the practice upon amendments under this section.

Misjoinder of defendants may be amended before or at trial.

37. It shall and may be lawful for the court or a judge in the case of the joinder of too many defendants in any action on contract, at any time before the trial of such cause, to order that the name or names of one or more of such defendants be struck out, if it shall appear to such court or judge that injustice will not be done by such amendment; and the amendment shall be made upon such terms as the court or judge, by whom such amendment is made, shall think proper; and in case it shall appear at the trial of any action on contract that there has been a misjoinder of defendants, such misjoinder may be amended, as a variance, at the trial, in like manner as the misjoinder of plaintiffs has been hereinbefore directed to be amended, and upon such terms as the court or judge, or other presiding officer, by whom such amendment is made, shall think proper.

Amendment of misjoinder of defendants.

The power of amendment given by this section is limited to actions on *contract*, in which the joinder of persons as defendants who ought not to have been so joined is fatal (p. 39, *ante*).

In actions in *tort* the plaintiff may always remedy the error of a misjoinder of defendants by entering a *nolle prosequi* as to such as are wrongly added before the trial; otherwise at the trial there will be, as to them, an acquittal.

The court under the former practice allowed the name of a defendant to be struck out of the proceedings, subsequent to the writ, on payment of costs, the remaining defendant being allowed to plead *de novo* (*Palmer* v. *Beale*, 9 Dowl. 529). As to the costs to be allowed in such a case, see *Jackson* v. *Nunn* (4 Q. B. 209). The amendment could not formerly have been made at Nisi Prius (*Cooper* v. *Whitehouse*, 6 C. & P. 545). But now this amendment may be made at any stage of the pleadings by summons at chambers, or by motion in court, or at the trial, in which latter case

the order must be endorsed as mentioned under s. 35 (*ante*, p. 41), the observations on which are generally applicable here.

In a case before this act, the court went further even than is authorized by this section. After the plaintiff had been nonsuited at the trial, it appeared that his remedy against the defendants really liable would be barred by the statute, unless the whole proceedings could be amended. On payment of all the costs, the Court of Exchequer set aside the nonsuit, and permitted the plaintiff to amend by striking out the names of the defendants who had been misjoined, the remaining defendant being at liberty to plead *de novo* (*Crauford* v. *Cocks*, 6 Exch. 287).

The Court of Exchequer refused to set aside an order of Martin, B., for striking out a co-defendant with liberty to remaining defendant to plead the nonjoinder in abatement (*Cowburn* v. *Wearing*, 9 Exch. 207). Where one of seven co-defendants had suffered judgment by default, the Court of Common Pleas allowed two of those who had appeared to be struck out *nunc pro tunc* (the point of the judge's power to amend having been reserved by consent at the time of the trial) *Johnson* v. *Goslett*, 18 C. B. 728; see also *Mulford* v. *Griffin*, 1 F. & F. 145; *Greaves* v. *Humphries*, 4 E. & B. 851).

This section has been held not to be applicable where the party was made a co-defendant on purpose to try his liability (*Wickens* v. *Steel*, 2 C. B., N. S. 488).

The amendment must be made *at* the trial (*Robson* v. *Doyle*, 3 E. & B. 396).

See notes to sections 34, 35, 36 and 38 (pp. 38—45).

As to the costs of a defendant so struck out, see *Redway* v. *Webber* (13 C. B., N. S. 254; L. J. 32, C. P. 84).

Upon plea in abatement for nonjoinder of defendants, proceedings may be amended.

38. In any action on contract where the nonjoinder of any person or persons as a co-defendant or co-defendants has been pleaded in abatement, the plaintiff shall be at liberty, without any order, to amend the writ of summons and the declaration, by adding the name or names of the person or persons named in such plea in abatement as joint contractors, and to serve the amended writ upon the person or persons so named in such plea in abatement, and to proceed against the original defendant or defendants, and the person or persons so named in such plea in abatement: provided that the date of such amendment shall, as between the person or persons so named in such plea in abatement and the plaintiff, be considered for all purposes as the commencement of the action.

The alteration of the writ, by adding the name of a defendant, whose nonjoinder has been pleaded, does not vitiate it, as it otherwise would (*Siggers* v. *Sansom*, 2 Dowl. 745).

Where a writ has been amended under this section, the person or persons named in the plea may stay proceedings against himself or themselves by payment of the debt and of the costs of the writ within four days of service upon him or them; *per* Martin, B. (*Meason* v. *Mountcastle*, 1 F. & F. 721).

As to the time of pleading to the amended declaration, see s. 90 (*post*, p. 84).

Replications to Pleas.

Replication to plea in abatement.

By 3 & 4 Will. 4, c. 42, s. 9, to the plea of nonjoinder of another person, the plaintiff may reply, that such person has been discharged by bankruptcy and certificate, or under an act for the relief of insolvent debtors (for forms of replication, see Bullen and Leake's Precedents of Pleadings); or take issue (s. 79, *post*).

See notes to previous sections; and s. 60 (*post*, p. 62).

Provision in the case of subsequent proceedings against the persons named in a plea in abatement for nonjoinder of defendants.

Costs after a plea in abatement.

39. In all cases after such plea in abatement and amendment, if it shall appear upon the trial of the action that the person or persons so named in such plea in abatement was or were jointly liable with the original defendant or defendants, the original defendant or defendants shall be entitled as against the plaintiff to the costs of such plea in abatement and amendment; but if at such trial it shall appear that the original defendant or any of the original defendants is or are liable, but that one or more of the persons named in such plea in abatement is or are not liable as a contracting party or parties, the plaintiff shall nevertheless be entitled to judgment against the other defendant or defendants who shall appear to be liable; and every defendant who is not so liable shall have judgment, and shall be entitled to his costs as against the plaintiff, who shall be allowed the same, together with the costs of the plea in abatement and amendment, as costs in the cause against the original defendant or defendants who shall have so pleaded in abatement the nonjoinder of such person: provided that any such defendant who shall have so pleaded in abatement shall be at liberty on the trial to adduce evidence of the liability of the defendants named by him in such plea in abatement.

The provisions of this section apply to those cases in which, after a plea in abatement for nonjoinder of a defendant, the plaintiff amends the writ under s. 38 (*ante*, p. 44). They evidently do not apply to the plea of coverture. The form of the new declaration after amendment is prescribed by s. 60, *post*.

A plaintiff sued M. for a money demand. M. pleaded in abatement the nonjoinder of B. and G. The plaintiff amended his pleadings, adding B. and G. as joint defendants. M. pleaded, as to £230, parcel, &c., payment into court, and as to the residue, never indebted. B. and G. each separately pleaded never indebted to the whole demand. On the trial a verdict was found for M., that no more than £230 were due; but as to B. and G., that they were jointly liable with M. for £212:—Held, by Crompton, J., in the Bail Court, that M. was entitled, under this section, to the costs of the plea in abatement and of the amend-

ment, and also to the general costs of the cause, and of the trial; and held also, that the plaintiffs were not entitled to any costs as against B. and G. (*Caxneau* v. *Morrice and others*, L. J. 25, Q. B. 126).

Husband and Wife.

Joinder of claims by husband and wife with claims in right of husband.

40. In any action brought by a man and his wife for an injury done to the wife, in respect of which she is necessarily joined as co-plaintiff, it shall be lawful for the husband to add thereto claims in his own right, and separate actions brought in respect of such claims may be consolidated, if the court or a judge shall think fit: provided that in the case of the death of either plaintiff such suit, so far only as relates to the causes of action, if any, which do not survive, shall abate.

In the case of *Dengate* v. *Gardiner* (4 M. & W. 5), which was an action for slander of the wife, whereby she lost employment, evidence of this special damage was not admitted in an action by the husband and wife.

The profit of the wife's wages are entirely the husband's, and "be alone (said Lord Abinger) can sue for the loss of them, just as in trespass by husband and wife for an assault on the wife, the surgeon's bill cannot be recovered. The right of action would not survive to her." The husband, therefore, in case of slander of his wife, was formerly obliged to sue alone for any special damage; just as in trespass, he was compelled to bring a separate action for the surgeon's bill. Where the defendant said of the plaintiff's wife, "you are a nuisance to live beside of, and your house is no better than a bawdy-house;" it was held that an action for this slander might be maintained by the husband alone (*Nickle* v. *Reynolds*, 7 C. B., N. S. 114).

The above enactment is limited to actions "for an injury done to his wife." It permits the husband to add to the joint cause of action claims arising to himself in his own right; but he may still bring his separate action (*Brockbank* v. *The Whitehaven Junction Railway Company*, L. J. 31, Ex. 349). The section does not in its terms limit the claims, which may be thus added to those he has *in respect to the injury done to the wife* (as for a surgeon's bill); and it might thence be argued that the husband may not only add counts against the defendant, for the *special damage* he has sustained in respect of the injury to the wife, but also counts for *goods sold and delivered*, or *money lent* by himself. But the intention of the commissioners, in recommending the change effected by this section (First Report, p. xi.), seems to have been, that claims arising to the husband in respect of the injury to the wife, and those alone, should be included in the joint action.

If the claims of the husband in his own right are stated in the same action, they must be set out in separate counts.

Where a husband brought an action for a personal injury to himself and to his trade by an explosion, and he and his wife brought a separate action for injuries sustained by her resulting from the same explosion; the Court of Exchequer consolidated the two actions under this section. (*Hemstead* v. *Phœnix Gas Company*, 3 H. & C. 745; L. J. 34, Ex. 108. See also *Morley* v. *Midland Railway Company*, 3 F. & F. 961, *cor.* Crompton, J.).

As to accounts stated with husband and wife, see *Johnson and Wife* v. *Lucas* (1 E. & B. 659; L. J. 22, Q. B. 174).

Joinder of Causes of Action.

Different causes of action may be joined, but separate trials may be ordered.

And with respect to joinder of causes of action, be it enacted as follows :—

41. Causes of action, of whatever kind, provided they be by and against the same parties and in the same rights, may be joined in the same suit; but this shall not extend to replevin or ejectment; and where two or more of the causes of action so joined are local, and arise in different counties, the venue may be laid in either of such counties; but the court or a judge shall have power to prevent the trial of different causes of action together, if such trial would be inexpedient, and in such case such court or judge may order separate records to be made up, and separate trials to be had.

Power is given to the plaintiff by this section of joining in one action all his claims, of whatever nature, against the same defendant, provided these claims are in the same right; but counts by the plaintiff as an individual cannot be joined with counts by him as an executor (2 Saund. 1117, d.; 2 Wms. Ex. 6th ed. 1729). This section is permissive, not compulsory. The commissioners who recommended this change, thought that plaintiffs might be safely trusted with this power. "A plaintiff is not likely to damage his claim for criminal conversation by adding a claim which may direct attention to a question of whether he is entitled to the price of goods sold, or other incongruous matter" (First Report, p. xxii.); see R. G., T. T. 1853, r. 1, *post*.

The Court of Exchequer refused to allow a count for an annuity to be joined with a count for breach of promise of marriage, because the parties would thus be let in as witnesses contrary to the statute (*Sherratt* v. *Webster*, 8 L. T., N. S. 254, E. T. 1863); and where, in an action for breach of promise of marriage, the declaration contained money counts, in respect of which the defendant paid money into court, Pollock, C. B., at the trial, ordered, under this section, that the causes of action should be tried separately (*Frean* v. *Watley*, 4 F. & F. 1038).

Counts in trover and detinue are not generally allowed to be joined when intended merely to cover one and the same cause of action (*Mockford* v. *Taylor*, 19 C. B., N. S. 209; L. J. 34, C. P. 352); and see R. G., T. T. 1853, r. 1, and note, *post*.

As to the *venue*, and changing the same, see s. 59, n. (*post*, p. 59).

Questions by Consent without Pleading.

And for the determination of questions raised by consent of the parties without pleading, be it enacted as follows :

Formerly a special case could only have been stated for the

opinion of the court after the parties had joined issue (3 & 4 Will. 4, c. 42, s. 25).

Questions of fact may, after writ issued, by consent and leave of a judge, be raised without pleadings.

42. Where the parties to an action are agreed as to the question or questions of fact to be decided between them, they may, after writ issued, and before judgment, by consent and order of a judge (which order any judge shall have power to make, upon being satisfied that the parties have a *bonâ fide* interest in the decision of such question or questions, and that the same is or are fit to be tried), proceed to the trial of any question or questions of fact without formal pleadings; and such question or questions may be stated for trial in an issue in the form contained in the Schedule (A.) to this act annexed, marked No. 6, and such issue may be entered for trial and tried accordingly in the same manner as any issue joined in an ordinary action; and the proceedings in such action and issue shall be under and subject to the ordinary control and jurisdiction of the court, as in other actions.

Questions by consent without pleading.

According to s. 227, *post*, the word "action" here means a "personal action," brought by writ of summons in any of the Superior Courts, and did not include replevin, ejectment, or any of the subsisting real actions; ejectment is provided for by s. 168 *et seq.*, *post*; as to replevin, see C. L. P. A. 1860, s. 22, n. *et seq.*; and as to real actions, see C. L. P. A. 1860, ss. 26, 27, *post*.

See as to the power of the court to direct an issue to be tried in the case of compulsory references, C. L. P. A. 1854, s. 4, *post*.

It is doubtful whether error can be brought upon a special case stated with some of several defendants only, the others having suffered judgment by default (*Boyd* v. *Robins and others*, 5 C. B., N. S. 597); *semble*, these sections do not apply at all in such a case.

The judge must be satisfied that the parties have a *bonâ fide interest* in the decision of the question. In a case where, in the opinion of the court, the parties merely desired to allay a doubt as to the true construction of a will, the Court of Common Pleas declined to give any opinion (*Doe* d. *Duntze* v. *Duntze*, 6 C. B. 100).

Agreement may be entered into for the payment of money and costs according to the result of the issue.

43. The parties may, if they think fit, enter into an agreement in writing, which shall not be subject to any stamp duty, and which shall be embodied in the said or any subsequent order, that, upon the finding of the jury in the affirmative or negative of such issue or issues, a sum of money fixed by the parties, or to be ascertained by the jury upon a question inserted in the issue for that purpose, shall be paid by one of such parties to the other of them, either with or without the costs of the action.

Judgment to be entered according to the agreement, and execution issued forthwith, unless stayed.

44. Upon the finding of the jury in any such issue, judgment may be entered for such sum as shall be so agreed or ascertained as aforesaid, with or without costs, as the case may be, and execution may issue upon such judgment forthwith, unless otherwise agreed, or unless the court or a judge shall otherwise order for the purpose of giving either party an opportunity for moving to set aside the verdict, or for a new trial.

Proceedings upon issue may be recorded.

45. The proceedings upon such issue may be recorded at the instance of either party, and the judgment, whether actually recorded or not, shall have the same effect as any other judgment in a contested action.

On a judgment recorded under this section error will lie, as it is not expressly excluded, as in *King* v. *Simmons* (7 Q. B. 289); and see *Thorpe* v. *Plowden* (1 L. M. & P. 387).

The judgment will also be a "record" for the purpose of being used in evidence if required.

Questions of law may be raised after writ issued by consent, &c., without pleading.

46. The parties may, after writ issued, and before judgment, by consent and order of a judge, state any question or questions of law in a special case for the opinion of the court, without any pleadings.

The court will decline to give any opinion when there is reason to believe that the action is not *bonâ fide* brought for the purpose of determining a matter in controversy between the parties (*Doe* d. *Duntze* v. *Duntze*, 6 C. B. 100). The case should be confined to questions of law; if matters of fact are in issue the court will leave the parties to go to a jury (*Aldridge* v. *Great Western Railway Co.*, 3 M. & G. 515; see also *Price* v. *Quarrel*, 12 A. & E. 784).

It has been thought that when a special case under this section has been settled, it will not be amended by the court unless by consent of the parties (*Mersey Docks, &c.* v. *Jones*, L. J. 29, C. P. 239; and see *Notman* v. *Anchor Insurance Company*, 6 C. B., N. S. 536; but see *Carpenter* v. *Parker*, 3 C. B., N. S. 206; L. J. 27, C. P. 78).

As to practice in ejectment, see s. 179, *post*.

Agreement as to payment of money and costs, according to judgment upon special case.

47. The parties may, if they think fit, enter into an agreement in writing, which shall not be subject to any stamp duty, and which shall be embodied in the said or any subsequent order, that, upon the judgment of the court being given in the affirmative or negative of the question or questions of law raised by such special case, a sum of money, fixed by the parties, or to be ascertained by the court, or in such manner as the court may direct, shall be paid by one of such parties to the other of them, either with or without

costs of the action; and the judgment of the court may be entered for such sum as shall be so agreed or ascertained, with or without costs, as the case may be, and execution may issue upon such judgment forthwith, unless otherwise agreed, or unless stayed by proceedings in error.

The last words of this sections,—"unless stayed by proceedings in error,"—did not, as it seems, allow of error being brought upon a special case stated under s. 46. Error did not lie on a special case stated under 3 & 4 Will. 4, c. 42, s. 25, such a case not being entered of record; and there can be no error at common law but on a record: the provisions of s. 46 (*ante*, p. 50), for entering a special case on record, were confined to the issue given by s. 42 (*ante*, p. 49); see further *Thorpe* v. *Plowden* (1 L. M. & P. 387). But now by the C. L. P. A. 1854, s. 32, *post*, error may be brought upon a special case. It was accordingly held by the Court of Exchequer Chamber (distinguishing *Hughes* v. *Lumley*, 4 E. & B. 358; L. J. 24, Q. B. 29), that where the consent of the parties to state a special case was given before the C. L. P. A. 1854, came into operation, but the judge's order was not obtained until the day upon which it came into operation, error might be brought (*Elliott* v. *Bishop*, 10 Exch. 522).

48. In case no agreement shall be entered into as to the costs of such action, the costs shall follow the event, and be recovered by the successful party.

Costs to follow the event, unless otherwise agreed.

PLEADINGS IN GENERAL.

And with respect to the language and form of pleadings in general, be it enacted as follows:—*

49. All statements which need not be proved, such as the statement of time, quantity, quality and value, where these are immaterial; the statement of losing and finding, and bailment, in actions for goods or their value; the statement of acts of trespass having been committed with force and arms, and against the peace of our lady the Queen; the statement of promises which need not be proved, as promises in indebitatus counts, and mutual promises to perform agreements; and all statements of a like kind, shall be omitted.

Fictitious and needless averments not to be made.

The insertion, therefore, of any of these formal statements will

* These sections relating to pleadings apply whether the action was originally commenced in the Superior Courts or not (*Mewiller* v. *Rose*, 11 C. B. 162; L. J. 22, C. P. 78). It is not proposed to notice here the various decisions of the courts upon the merits of particular pleadings; and the reader is referred for such information to the excellent Precedents of Pleadings, by Messrs. Bullen & Leake, whereof a third edition has just been published, and wherein is embodied all the principles and practice of pleading.

be an irregularity, and if embarrassment be caused thereby, an application may be made under s. 52 (*infra*).

The bailment must still be stated, however, where it is material and traversable (*Ross* v. *Hill*, 2 C. B. 877).

Judgment upon demurrer to be given according to the very right of the cause.

50. Either party may object by demurrer to the pleading of the opposite party, on the ground that such pleading does not set forth sufficient ground of action, defence or reply, as the case may be; and where issue is joined on such demurrer, the court shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, defect in or lack of form; and no judgment shall be arrested, stayed or reversed for any such imperfection, omission, defect in or lack of form.

For a pleading to be good on demurrer under this section, it must be such as would have been good on general demurrer before this act (*Richards* v. *Beavis*, 2 Com. Law Rep. 673, Q. B., E. T. 1854).

It would manifestly be quite out of place here to attempt to show within anything like reasonable space what constitutes a pleading "in matter sufficient." This belongs to the science of pleading itself, not to a commentary on the practice of the courts.

Objections by way of special demurrer taken away.

51. No pleading shall be deemed insufficient for any defect which could heretofore only be objected to by special demurrer.

See as to special demurrer, Bullen and Leake's Precedents of Pleadings, 2nd ed., p. 690.

Pleadings framed to embarrass may be struck out or amended.

52. If any pleading be so framed as to prejudice, embarrass or delay the fair trial of the action, the opposite party may apply to the court or a judge to strike out or amend such pleading, and the court or any judge shall make such order respecting the same, and also respecting the costs of the application, as such court or judge shall see fit.

It has always been, theoretically, one of the rules, if not one of the results, of special pleading, that no pleading should be framed to prejudice, embarrass or delay the fair trial of the action; and there are numerous cases in the books in which the courts have allowed the plaintiff to sign judgment as for want of a plea, —cases in which, practically, the fair trial was attempted to be embarrassed or delayed. Persons who have no defence sometimes had recourse to what is called *sham pleading*; and for this purpose the plea of judgment recovered was resorted to. The rule of Hil. 2 Will. 4 (renewed by R. G., H. T. 1853, r. 10, *post*), to the effect that, in the margin of such a plea, the date of the judgment and

its number on the roll should thenceforth be stated, put an end to this abuse.

Without presuming to lay down a rule as to what may be considered as tending to "prejudice, embarrass or delay" the trial of the action, it may be useful here to refer to a few cases of unfair pleading. It may be observed, that the words used, "prejudice, embarrass or delay" are used disjunctively.

Sham pleading, and pleading for delay.

All pleadings ought to be true. A pleading false on the face of it may be treated as a nullity. Thus, where the plaintiff declared on two bills of exchange, due 5th and 6th December, and the defendant pleaded a judgment recovered in Michaelmas Term preceding these dates, the plaintiff was considered right in signing judgment (*Vere* v. *Carden*, 5 Bing. 413; see also *Blewitt* v. *Marsden*, 10 East, 237; and *Balmanno* v. *Thompson*, 8 Dowl. 76). But unless the inference of falsity be irresistible, the plaintiff should not take upon himself to sign judgment, treating the plea as a nullity; but should apply to set it aside (*Bell* v. *Alexander*, 6 M. & S. 133).

The court will not try the truth of a plea upon affidavit. Where the defendant pleaded in satisfaction of the plaintiff's demands, delivery to him of a pipe of wine, the court refused to allow the plaintiff to sign judgment, upon an affidavit that the plea was false. There was nothing absurd or inconsistent in the allegation that wine had been given in satisfaction of a demand (*Smith* v. *Backwell*, 4 Bing. 513). In *Richley* v. *Proone* (1 B. & C. 286), a plea was set aside on an affidavit of falsity; but this decision is explained in *Merrington* v. *Becket* (2 B. & C. 81), and in *Smith* v. *Backwell*, *supra*; see also *La Forest* v. *Langan* (4 Dowl. 642); *Nutt* v. *Rush* (4 Exch. 490).

Where the plea was so prepared that it was likely to occasion perplexity and expense, it was set aside (*Smith* v. *Hardy*, 8 Bing. 435).

Pleading falsely for *delay* also affords ground for applying to set aside the plea. In *Shadwell* v. *Berthoud* (5 B. & A. 760), the plea, which was wholly false, alleged indebtedness by the plaintiff in a larger sum by virtue of a recognizance in the Exchequer. In *Body* v. *Johnson* (5 B. & A. 751, n.), the defendant pleaded, 1stly, the general issue, except as to part; and as to one-third of that part, 2ndly, a bond given in satisfaction; to another, 3rdly, a set-off; and as to the residue, 4thly, a note given to the plaintiff. On an affidavit that these pleas were false, the court allowed the plaintiffs in each case to sign judgment. This course was also followed in *Smith* v. *Hardy* (8 Bing. 435), where to an action on a judgment the defendant pleaded a release, which had been destroyed by accident. In *Corbett* v. *Powell* (5 B. & A. 760), a false plea to debt on bond, by executor, that before the death of the testator the bond had been assigned, and that payment had been made to the assignee, was set aside. In *Bartley* v. *Godslake* (2 B. & A. 199), a plea setting out an accounting or agreement as to the balance, and payment partly by bill of exchange and partly by assignment of an Irish judgment debt, and which was wholly false, was set aside (see *Nutt* v. *Rush*, 4 Exch. 190). In *Miley* v. *Walls* (1 Dowl. 648), a false plea that the signature of the defendant to the bill on which the action was brought was obtained without consideration, he having signed a blank stamp merely, was set aside.

There are some cases in which pleas have been set aside on

Pleadings which embarrass.

the ground of their being calculated to *embarrass* the plaintiff in replying. Thus, where the plea mixes together a great variety of assertions, some of which contain matter of law, and some matters of fact to which it is impossible to reply, and the object is to perplex and delay. rather than to set up a good ground of defence, it will be set aside (*Balmanno* v. *Thompson*, 8 Dowl. 76). In *assumpsit* on a promissory note, payee against makers, the defendant pleaded that there was no consideration, and that the note was made subject to the condition that the defendants should not be called upon to pay if they were not able, but that it should be renewed. There was an affidavit of falsehood. The court set aside the plea as tricky, false, and calculated to *embarrass* the plaintiff (*Mitford* v. *Finden*, 8 M. & W. 511). A plea by a defendant, that a third person, at his request, guaranteed the debt to the plaintiff, which guarantee the plaintiff accepted and then released the defendant, was designated by Maule, J., as *complicated and sham* (*Waterman* v. *Carden*, 6 M. & G. 752). But a plea which puts a plaintiff to difficult, expensive, and needless proof, cannot, if in accordance with the rules and practice of pleading, be set aside (*Welland Railway Company* v. *Blake*, 6 H. & N. 410; L. J. 30, Ex. 161). An allegation in a count on the breach of a contract that the defendant fraudulently omitted to deliver true accounts, and delivered untrue accounts, was ordered by Willes, J., to be amended under this section, by striking out the word "fraudulently." (*The Great Ship Company* v. *Russell*, 3 F. & F. 94). A plea may also be objected to under this section as being too general, as where in an action by a landowner against a railway company, under sect. 68 of the Lands Clauses Consolidation Act, 1845, the plaintiff sought to recover the full amount of compensation claimed by him, the Court of Common Pleas refused to allow the defendants to plead generally, that the claim was fraudulent and not *bonâ fide* (*Hooper* v. *Bristol Port Railway and Pier Company*, L. J. 35, C. P. 299).

Frivolous pleadings.

A plea which is clearly frivolous, and contains no answer to the action, will be set aside (*Bradbury* v. *Emans*, 5 M. & W. 595); in which case an acceptor, sued by an indorsee, pleaded the giving of another bill to drawer in renewal, and that he had no notice of the indorsement. Where in an action by indorsee against acceptor on two bills, the pleas were to one bill, no consideration between drawer and defendant; to the other no consideration paid by plaintiff to defendant,—both pleas were set aside as frivolous (*Knowles* v. *Burward*, 10 A. & E. 19), but the mere fact of a plea being insufficient in point of law does not justify an application for leave to sign judgment (*Cowper* v. *Jones*, 4 Dowl. 591; and see *Balmanno* v. *Thompson*, 8 Dowl. 76), for the plaintiff may demur. If a defendant be under terms of pleading issuably, and plead a clearly bad plea, the plaintiff may sign judgment as for want of a plea. See in Chitty's Practice (12th edit. vol. i. p. 248) a collection of cases of non-issuable pleas; and see *Bishop of London* v. *M'Neil* (L. J. 23, Ex. 111); *Sully* v. *Freame* (10 Exch. 535); and *Millett* v. *Brown* (2 H. & N. 837). See also observations in *Oulds* v. *Harrison* (10 Exch. 578).

Where the plea is not *clearly* frivolous (as where it is pleaded in the form prescribed by a rule of court), the court will not interfere on motion (*Horner* v. *Keppel*, 10 A. & E. 17; and see 2 P. & D. 234,—*obs. by Coleridge J.*).

The court has, in several of the above cases, strongly reprobated the pleading of sham pleas. Bad pleading for delay has always been treated as a contempt, and the fines for it once formed a source of revenue to the crown (Com. Dig. Prerogative D. 22). In *Pierce* v. *Blake* (Salk. 515), the attorney in the cause was fined, and in *Blewitt* v. *Marsden* (10 East, 237) and *Bartley* v. *Godslake* (2 B. & A. 199), he was ordered to pay the costs.

Cases upon this section.

A replication to a plea of the Statute of Limitations (3 & 4 Will. 4, c. 42), that the defendant made an acknowledgment that the debt remained unpaid and due to the plaintiff within the true intent and meaning of the statute, and that the action was brought within twenty years after such acknowledgment, was held to be so framed as to embarrass and prejudice the fair trial of the cause, and must be amended by specifying one or more of the modes of acknowledgment mentioned in the statute (*Forsyth* v. *Bristowe*, L. J. 22, Ex. 70).

In an action for infringement of patent a plea which amounted to an argumentative traverse of the specification was struck out (*Hancock* v. *Noyes*, 9 Exch. 388).

See also *Cuthbertson* v. *Irving* (4 H. & N. 742).

It remains doubtful whether this action applies to proceedings upon a prerogative writ of *mandamus* (*Reg.* v. *The Saddlers' Company*, L. J. 22, Q. B. 451), but now see C. L. P. A. 1854, s. 77, *post*.

See as to costs, *Barnes* v. *Hayward* (1 H. & N. 242).

?Section

Four days' notice substituted for rule to declare, reply or rejoin.

53. Rules to declare, or to declare peremptorily, and rules to reply, and plead subsequent pleadings, shall not be necessary, and instead thereof a notice shall be substituted requiring the opposite party to declare, reply, rejoin, or as the case may be, within four days, otherwise judgment; such notice to be delivered separately or indorsed on any pleading to which the opposite party is required to reply, rejoin, or as the case may be.

This notice may be given in vacation, as well as in term time; but it may not be given while proceedings are stayed by order; and a judgment of *non pros.* signed upon a notice so given and a consequent default may be set aside (*Medway* v. *Gilbert*, 1 H. & C. 496; L. J. 32, Ex. 30).

Time for declaring.

After the entry of an appearance the plaintiff may declare at any time, except of course between the 10th of August and the 24th of October. He has the whole of the term next after the entry of the appearance to declare in, without having judgment of *non pros.* signed against him (*Foster* v. *Prynne*, 9 Dowl. 749). If no judgment of *non pros.* be signed, he has a year to declare in, after the return day of the writ, after which period he will be out of court (s. 58, *post*, p 59).

If the plaintiff is unable to declare within the time allowed him, as, for instance, where he has been unable to serve one or more of several defendants, in which case to declare against one and then against the other, when they appeared, would be irre-

gular (*Morton* v. *Grey*, 9 B. & C. 544), he should, if he receives a notice to declare from the defendants who have appeared, obtain time to declare upon application to a judge; as the old side bar rule for time is abolished (R. G., H. T. 1853, r. 7, *post*).

The defendant, in order to prevent delay, may, if the plaintiff does not declare within the time limited, deliver a notice under the above section.

If the plaintiff after this demand requires further time, his course is to apply for it specially to the court or a judge; and if the defendant signs judgment before the time for showing cause, such judgment may be set aside, the defendant's proper course being to show cause (*Beazley* v. *Bailey*, 16 M. & W. 58). One demand only is necessary. If the plaintiff obtains further time to declare after such demand, the defendant is entitled to sign judgment at the expiration of the time allowed, without a fresh demand (*Teulon* v. *Gant*, 5 Dowl. 153).

This proceeding is not applicable in causes removed by *certiorari* (*Garton* v. *G. W. Railway Company*, 1 E. & E. 258; L. J. 28, Q. B. 103).

Notice to reply.

The plaintiff may reply at any time, except between the 10th of August and 24th of October, and he may be compelled to do so by a notice or demand of replication, which may be endorsed on the plea, or delivered separately.

Formerly, if after a rule to reply had been given in one term the cause stood over until the next, a fresh rule was necessary; but this has ceased to be the practice (*Pryer* v. *Smith*, 2 Dowl. 114). The plaintiff may apply for further time on showing facts to justify the application (*Crutchley* v. *L. and B. Railway Company*, 2 D. & L. 102).

If a party deliver a pleading after the time for doing so has expired, but before the opposite party has signed judgment, judgment signed after such delivery will be set aside (*Gray* v. *Pennell*, 1 Dowl. 120).

As to rules to plead, see s. 62 (*post*, p. 65).

As to rules to rejoin, see s. 78 (*post*, p. 78).

Pleadings to be dated and entered as of time of pleading, unless order to the contrary.

54. Every declaration, and other pleading shall be entitled of the proper court, and of the day of the month and the year when the same was pleaded, and shall bear no other time or date, and every declaration and other pleading shall also be entered on the record made up for trial and on the judgment roll under the date of the day of the month and year when the same respectively took place, and without reference to any other time or date, unless otherwise specially ordered by the court or a judge.

The pleadings should be entitled on the face; entitling them on the back is not sufficient; and if not properly entitled a pleading may be set aside as irregular (*Ripling* v. *Watts*, 4 Dowl. 290). So the date must be stated, and it must be stated to be "in the year of our Lord," mentioning the year (*Holland* v. *Tealde*, 8 Dowl. 320); otherwise it will be irregular. The want of a date (*Ripling* v. *Watts*, *ubi supra*), or a date different from

that of filing or delivery, will constitute an irregularity, amendable at the plaintiff's cost (*Hodson* v. *Pennell*, 4 M. & W. 373).

An added plea should bear the same date as the original pleas (*Short* v. *Simpson*, L. R. 1, C. P. 248, n., *per* Willes, J.).

Profert and *oyer* abolished.

55. It shall not be necessary to make profert of any deed or other document mentioned or relied on in any pleading; and if profert shall be made it shall not entitle the opposite party to crave oyer of or set out upon oyer such deed or other document.

In an action by an executor who had not taken out probate, proceedings were stayed until it should be produced (*Webb* v. *Atkins*, 14 C. B. 401).

See note to following section.

Document may be set forth, and be considered a part of the pleading in which it is set forth.

56. A party pleading in answer to any pleading in which any document is mentioned or referred to shall be at liberty to set out the whole or such part thereof as may be material, and the matter so set out shall be deemed and taken to be part of the pleading in which it is set out.

Where to a declaration upon an award the defendant set out the award in his plea, and thereupon demurred to the declaration, the plea was held bad, as the award was to be taken as part of the plea (*Sim* v. *Edmands*, 15 C. B. 240; L. J. 23, C. P. 229; and better, 2 Com. Law Rep. 749).

Formerly, if a plaintiff declared on a deed to which he was a party, and which was in his possession, he was obliged to make profert, *i. e.* to produce the deed to the court. If his opponent wished to bring any part of that deed before the court, or to deny its being his deed, he was obliged to demand oyer, that is, theoretically, to ask to have it read in court, practically, to get a copy from the plaintiff's attorney. He was then obliged to set out the whole deed in his pleading, though the question might turn upon twenty words. Questions of pleading were constantly arising as to the effect of oyer, and how advantage ought to be taken of an omission or misrecital of the deed. The cases are collected in *Smith* v. *Yeomans* (1 Wms. Saund. 317), and in *Turquand* v. *Hennett* (7 C. B. 179).

No profert was required of instruments not under seal, nor even of instruments not falling within the technical description of a "deed," as a sealed will, or a sealed award. A defendant, entitled to an inspection of such documents, applied to the court for such inspection, which was only granted in certain limited cases. The cases in which inspection was so granted were found in practice to be too limited in number, and the commissioners appointed to report on the pleading and practice of the superior courts, being further of opinion that the formalities of profert and oyer might be advantageously done away with, and that "deeds" might be placed on the same footing as ordinary written instruments, recommended that wherever inspection of any document could be had by a bill of discovery in equity, it should be obtainable in any court of common law where the action was

pending. In consequence of this recommendation provision was made by 14 & 15 Vict. c. 99, s. 6 (see C. L. P. A. 1854, s. 50. n., *post*), and profert and oyer were abolished by the above section.

Profert no longer necessary.

A plaintiff need not now make profert, but in his declaration he must state concisely the effect of that part of the deed on which he relies (Sched. B., No. 24, *post*). Nor need a defendant make profert in a plea, but he may, in the same way, state the effect of the deed on which he grounds his defence (Sched. B., No. 42, *post*). If one party rely on any part of a deed in the other party's possession, of which he requires inspection, he must apply for such inspection, by summons or rule, as has hitherto been the practice in reference to ordinary written instruments. "Oyer," did not include inspection.

Nor is profert of letters testamentary or letters of administration required, the section stating expressly "any deed or *other document* mentioned or relied on in any pleading."

Performance of conditions precedent may be averred generally.

57. It shall be lawful for the plaintiff or defendant in any action to aver performance of conditions precedent generally, and the opposite party shall not deny such averment generally, but shall specify in his pleading the condition or conditions precedent the performance of which he intends to contest.

A form of the averment of performance of conditions precedent generally is given in Schedule B., No. 22, *post*, where the plaintiff states that "he did all things necessary on his part" to entitle him, &c.

It is one of the rules of pleading, that, when the obligation to perform a contract depends on any event which does not from the declaration appear to have occurred, the averment of such event is essential to the logical statement of the cause of action, so stringently insisted on in pleading. The performance of a condition precedent must, formerly, not only have been stated specially, but ordinarily the time, place and manner of performance; and if there were several different acts or things to be done, the performance of each must in this way have been stated (*Holdipp* v. *Otway*, 2 Wms. Saund. 107 b, n. 3). Where performance could not be averred, it was necessary to show an excuse of nonperformance. This section permits the performance of conditions precedent to be averred generally, but matter of excuse for nonperformance should still be averred specially.

The above enactment is a return to the ancient system of pleading (*Thorpe* v. *Thorpe*, 1 Lord Raymond, 662; and see *Manby* v. *Cremonini*, L. J. 21, Ex. 288). The omission to aver, generally, performance of conditions precedent, may still form the subject of general demurrer. The principal cases decided upon this section are *Bentley* v. *Dawes* (9 Exch. 666); *Graves* v. *Legg* (9 Exch. 715). The effect of it is well discussed in "Bullen and Leake's Precedents of Pleadings," 2nd edit. pp. 124, 125, 483.

Notwithstanding this section, when a defendant averred in his plea performance of conditions precedent generally, a general replication was held to be, by reason of s. 77 (*post*, p. 78), a sufficient traverse by the plaintiff of the performance of any particular

condition precedent on which he relies (*Tetley* v. *Wanless*, L. R. 2, Ex. 21, 25, *per* Bramwell, B.) *Sed quære.*

DECLARATION.

And with regard to the time and manner of declaring, and to particulars of demand, be it enacted as follows:

It may be observed here, that there is no enactment about "particulars of demand," except that a special endorsement on the writ shall be equivalent to particulars (s. 25, *ante*, p. 31). As to particulars of demand, see R. G., H. T. 1853, rr. 19—21; as to pleading after an order for particulars, see s. 62, n. (*post*, p. 65). As to the form of particulars, see s. 59, n. (*post*, p. 60).

58. A plaintiff shall be deemed out of court, unless he declare within one year after the writ of summons is returnable. Plaintiff to declare within a year.

A writ of summons is returnable immediately on service being effected (*Baines* v. *Jackson*, 3 Dowl. 404); and the year here stated is not "four terms" (*Chaplin* v. *Showler*, L. J. 18, Ex. 34). If a notice of declaration is delivered after the expiration of one year from the service of the writ, it may be set aside at chambers as an irregularity (*Chaplin* v. *Showler*, *ubi supra*). In actions removed from inferior courts by *certiorari*, &c., the plaintiff is not out of court until a year after the return of the writ by which the cause was removed (*Norrish* v. *Richards*, 3 A. & E. 733). Nor is a plaintiff bound to proceed in the superior court; nor can a defendant, after notice to the plaintiff under s. 53 (*ante*, p. 55), sign judgment and obtain the costs of removal (*Garton* v. *G. W. R. Company*, 1 E. & E. 258; L. J. 28, Q. B. 103).

It seems very doubtful whether under the old rule of court, which was similar in terms to the present, the year within which the plaintiff had to declare did not include periods during which his proceedings were stayed by order of the court, or by injunction. See *Horn* v. *Took* (2 Dowl. 776); *Unite* v. *Humphrey* (3 Dowl. 532); *Johns* v. *Sanders* (5 D. & L. 49); but see *Ross* v. *Green* (old practice) (10 Exch. 891). The present statutory enactment is perhaps even less flexible.

This section cannot, by reason of its very terms, apply in ejectment (*Scope* v. *Paddison*, 6 H. & N. 641; L. J. 30, Ex. 244).

See also R. G., H. T. 176, *post*; and *Metcalfe* v. *Hetherington* (3 H. & N. 755).

59. Every declaration shall commence as follows, or to the like effect:* Forms of commencement, &c. of declaration.

[Venue.] "*A. B.* by *E. F.*, his attorney [*or* 'in

* Declarations by infants, and others who cannot prosecute actions in person or by attorney, should be in their appropriate forms.

person,' *as the case may be*], sues *C. D.* for [*here state the cause of action*];"

and shall conclude as follows, or to the like effect:

"And the plaintiff claims £ , [*or if the action is brought to recover specific goods*, the plaintiff claims a return of the said goods, or their value, and £ for their detention.]"

Suing in person or by attorney.

If this form is not followed, as by omitting the statement of whether the plaintiff sues in person or by attorney, the declaration will be irregular, and may be set aside or amended under s. 222, *post*; and the application to do so ought to be made to a judge at chambers (*White* v. *Feltham*, 3 C. B. 658).

The venue.

The declaration must be entitled of the court, and of the true date of pleading the same (s. 54, *ante*, p. 56). In the margin is stated the venue (Pl. R., T. T. 1853, r. 4, *post*). The law as to the venue will be found in *Peacock* v. *Bell*, 1 Wms. Saund. 73; in the notes to *Mostyn* v. *Fabrigas*, Smith's L. C. 6th ed. vol. i. p. 623; and in Bullen and Leake's "Precedents of Pleadings," 2nd ed. pp. 1—3, which see also as to distinction between local and transitory actions. See also on venue, *Simmons* v. *Lillystone* (8 Exch. 431).

As to the prerogative right of the crown to lay the venue in any county, see *Att.-Gen. of the Prince of Wales* v. *Crossman* (L. R. 1, Ex. 381).

The omission of the venue is an irregularity; and, if a wrong venue is stated in a local action, and the error appears on the record, the objection may be taken on demurrer (*Mayor of Berwick-upon-Tweed* v. *Shanks*, 3 Bing. 459; *Simmons* v. *Lillystone*, *ubi supra*; *Clayton* v. *Best*, 8 L. T., N. S. 502, Q. B., E. T. 1863; see also *Remington* v. *Taylor*, 1 Lutw. 235). If the error did not appear upon the record, it had to be pleaded; for a jury could only inquire of the issues raised (*Boyes* v. *Hewetson*, 2 Bing., N. C. 575; *Richards* v. *Easto*, 15 M. & W. 244); and in such case it could not be a ground of nonsuit (*Hitchings* v. *Hollingsworth*, 7 Moore, P. C. C. 228). But where in a local action a wrong venue, *Essex*, was stated in the margin, and no other locality appeared in the declaration, it was held that the effect of R. G., T. T. 1853, r. 4 (*post*), was to incorporate in the declaration an allegation that the causes of action arose in *Essex*, and therefore there was a variance which entitled the defendant to a nonsuit. (*Richardson* v. *Lochlin*, 6 B. & S. 777; L. J. 34, Q. B. 225). In the case of actions against magistrates, public officers and others, that are made local by various acts of parliament, where a wrong venue is fatal upon a statutory plea of "not guilty," error of venue cannot be taken advantage of after verdict (16 & 17 Car. 2, c. 8, s. 1; *Boyes* v. *Hewetson*, *ubi supra*).

Where several causes of action, which are local, and arise in different counties, are joined in one declaration, the venue may be laid in either of the counties (s. 41, *ante*, p. 48).

The venue cannot be changed, unless by consent, without the special order of the court or of a judge (R. G., H. T. 1853, r. 18, *post*); and it was held, that the order could only be obtained after issue joined, and upon an affidavit setting out special circumstances (*Ramsden* v. *Skipp*, 13 C. B. 601); but the committee of

judges, to whom was referred the consideration of the practice to be adopted in consequence of the above rule, reported:—

"Firstly: That in their opinion it is more convenient as a general rule, that the application to change the venue by rule or summons may be made before issue joined, provided that this shall not prejudice either party from applying, after issue is joined, to lay the venue in another county, if it shall appear that it may be more conveniently tried in such county:

"Secondly: That a defendant, on his affidavit to obtain the rule *nisi* to change venue, or in support of a summons for that purpose before issue joined, should state all the circumstances on which he means to rely as the ground for the change of venue; but that he may, if he pleases, rely only on the fact, that the cause of action arose in the county to which he seeks to have the venue changed,* which ground shall be deemed sufficient, unless the plaintiff shows that the cause may be more conveniently tried in the county in which it was originally laid, or other good reason why the venue should not be changed.

"J. PARKE. W. WIGHTMAN."

The Court of Exchequer thereupon stated that the above rule must be understood with reference to those species of actions in which, according to the previously-existing practice, the venue could be changed (*De Rothschild* v. *Shilston*, 8 Exch. 50—3 506, n.).

The application of this rule was discussed in *Smith* v. *O'Brien* (L. J. 26, Exch. 30), where it was held, that in an action of debt, not upon a deed, or an award, or any specialty, or quasi specialty, the venue will still be changed on the common affidavit before issue, if it is not answered by an affidavit showing that the trial can take place more conveniently in the original county; as, for example, on the ground that the witnesses reside there. Thus, in actions for use and occupation, the venue would be changed on the common affidavit before issue, although the claim be for rent on a lease, it not appearing on the affidavit in answer that the action is on a deed, nor that the plaintiff's witnesses reside in the original county. When the common affidavit is answered by the plaintiff upon special matter, the court will exercise its discretion upon the whole case before it (*Ross* v. *Napier*, L. J. 30, Ex. 2). And generally it may be said that, notwithstanding the above resolutions in Shilston's case, the courts will not change the venue unless there is some great and obvious preponderance of convenience in trying the cause elsewhere (*Darie* v. *Hopwood*, 7 C. B., N. S. 835; *S. C.*, *sub nom. Drury* v. *Hopwood*, L. J. 29, C. P. 151; *Blackman* v. *Bainton*, 15 C. B., N. S. 432). It has, indeed, been denied that those resolutions could be called the resolutions of the judges, or that they limit the exercise of their discretion (*Per* Willes, J., *Jackson* v. *Kidd*, 8 C. B., N. S. 354). The mere frequency of the sittings at Nisi Prius in London is not a sufficient reason for changing a venue thither (*Cole* v. *The Hull Dock Company*, 11 W. R. 284, Q. B., H. T. 1863; see also *Benham* v. *Wetherel*, 11 W. R. 66, Q. B., M. T. 1862). It would seem that the fact of the defendant's attornies being the under-sheriffs, may be sufficient ground for changing the venue at the instance of the plaintiff, at

* The common affidavit.

least where other circumstances exist so as to make it doubtful whether a fair trial can be had (*Hilton* v. *Green*, 10 W. R. 627, Ex., E. T. 1862); as to the effect of local influence of one of the parties, see *Walker* v. *Brogden* (17 C. B., N. S. 571); as to the effect of the other party having retained the most eminent counsel on the circuit, see *Curtis* v. *Lewis* (5 B. & S. 598). The court will not disturb a decision of a judge in the exercise of his discretionary power, where the affidavit before him is not strictly the common affidavit (*Begg* v. *Forbes*, 13 C. B. 604; L. J. 23, C. P. 222; *Cairncross* v. *Owen*, L. J. Notes of C. 1866, p. 41, Ex., H. T.). The better course is to apply at chambers to bring back the venue upon fresh affidavits (*Brown* v. *Clifton*, 10 W. R. 86, Ex., M. T. 1861). See also as to reviewing orders, *Cartwright* v. *Frost* (3 H. & N. 278); *Penhallow* v. *Mersey Dock and Harbour Company* (L. J. 29, Ex. 21); *Schuster* v. *Wheelwright*, (8 C. B., N. S. 383; L. J. 29, C. P. 222); and as to time within which a rule to review should be obtained, *Durie* v. *Hopwood* (*ubi supra*).

It would seem that the only rule observed in practice is that, after issue joined, the judge will take into consideration all the circumstances of the case, and use his discretion as to whether the venue should be changed or not, and that the court will very rarely interfere with the discretion so exercised.

A defendant who has got an order for time to plead *on the terms of taking short notice of trial*, is not entitled to have the venue changed, either before or after issue joined, on the common affidavit that the cause of action arose in the county into which he seeks to change the venue, and not elsewhere; and *semble*, that an affidavit to that effect, which stated in addition, that the witnesses on both sides resided in the county to which it was sought to change the venue, amounts to no more than the common affidavit (*Clulee* v. *Bradley*, 13 C. B. 604; L. J. 23, C. P. 28); and see also *Jackson* v. *Kidd* (8 C. B., N. S. 354; L. J. 29, C. P. 221).

It would seem that the venue may be changed in a penal action (*Greenough* v. *Parker*, L. J. 31, Ex. 4); and also in an information in the nature of a *quo warranto* (*Reg.* v. *Clerk*, 3 E. & E. 147; L. J. 29, Q. B. 232).

The declaration must correspond with the writ in, 1st, the names of the parties; 2nd, the number of the parties; 3rd, the character in which the plaintiff sues, or the defendant is sued. Objection, when it does not do so, should be made within the time allowed for pleading (*Kitchen* v. *Roots*, 2 Dowl. 232).

Names of the parties.

1st. An incorrect statement of the name of the plaintiff in the declaration may, since 3 & 4 Will. 4, c. 42, s. 11, be amended, at his cost, on the defendant's application, as the declaration is not on this ground irregular (*Lindsey* v. *Wells*, 3 Bing., N. C. 777).

If the plaintiff has been incorrectly named in the writ, he ought to be correctly named in the declaration, and a statement therein inserted that he sued by the wrong name.

If the defendant appears by the name in which he is sued, the plaintiff may declare against him in that name; if he appears by another name, the plaintiff ought to declare against him in that name, stating also the name by which he was sued in the writ.

If the defendant is misnamed, his remedy is under the 3 & 4 Will. 4, c. 42, s. 11, above referred to. He may apply to amend the declaration by inserting the correct name (*Rush* v. *Kennedy*, 7 Dowl. 199).

The application should be by a summons at chambers, founded on affidavit of the correct name.

Number of the parties.

2nd. A declaration by one of two plaintiffs named in the writ would be irregular (*Rogers* v. *Jenkins*, 1 B. & P. 383); unless in the event of the death of the other, which should be suggested (s. 136, *post*, p. 115). As to amending the writ and declaration by inserting or striking out the name of a plaintiff, see ss. 34, 35 (*ante*, pp. 38—43); adding, without an order, in the declaration a party not named in the writ would be an irregularity (*Haigh* v. *Conway*, 15 East, 1; *Rogers* v. *Jenkins*, 1 B. & P. 383; and *quære*, as to amendment, *Baker* v. *Neaves*, 1 Dowl. 616, and *Goodchild* v. *Loadham*, 1 Exch. 707).

If the writ contains the names of several defendants, the plaintiff may declare against one (*Davies* v. *Thompson*, 14 M. & W. 161, 165; *Coldwell* v. *Blake*, 3 Dowl. 656); dropping all proceedings against the others; and running the risk of a plea in abatement where such plea may be pleaded (s. 38, *ante*, p. 45). If the writ is against two, and only one can be served, the plaintiff has a choice of proceeding against the one, or of keeping up his right of action against the other (s. 33, *ante*, p. 38). Where a plaintiff declares against some only of several defendants who have appeared, he is liable, after notice to declare, to judgment of *non pros.* by a defendant against whom he has not declared (*Bancroft* v. *Greenwood*, 1 H. & C. 778; L. J. 32, Exch. 154).

Character of the parties.

3rd. A plaintiff simply named in the writ may declare in a representative capacity. If he has described himself A. B., *executor*, *administrator* or *assignee*, he may declare for a cause of action in his own right; but if he describes himself *as* executor, or *as* administrator, or *as* assignee, he can only declare for causes of action accruing to him in such character. The cases are collected in a note to an anonymous case reported in 1 Dowl. 97; and see *Christie* v. *Bell* (16 M. & W. 769). Analogous rules hold with respect to defendants.

Conclusion of declaration.

So as to the conclusion, the declaration will be irregular if the form prescribed is not followed.

Particulars of Demand.

Particulars of demand.

See the rules of court (R. G., H. T. 1853, rr. 19—21) as to the delivery of particulars of demand, *post*.

Commencement of declaration after plea of nonjoinder.

60. In all cases in which, after a plea in abatement of the nonjoinder of another person as defendant, the plaintiff shall, without having proceeded to trial on an issue thereon, commence another action against the defendant or defendants in the action in which such plea in abatement shall have been pleaded and the person or persons named in such plea in abatement as joint contractors, or shall amend by adding the omitted defendant or defendants, the commencement of the

declaration shall be in the following form, or to the like effect:

[Venue.] "*A. B.* by *E. F.*, his attorney [*or* 'in his own proper person,' &c.], sues *C. D.* and *G. H.*, which said *C. D.* has heretofore pleaded in abatement the nonjoinder of the said *G. H.* for," *&c.*

This section is in the words of the old rule of H. T., 4 Will. 4. It is advisable to adhere to the form given by the section, as a departure from it may be irregular (*White* v. *Feltham*, 3 C. B. 658).

Upon a plea in abatement for nonjoinder, the plaintiff may amend his writ, serve it on the added defendants (s. 38, *ante*, p. 45), and declare *de novo*. If the plea is true in fact, he will have to pay costs (s. 39, *ante*, p. 46).

Cassetur breve.

To avoid the payment of costs, the plaintiff may enter a *cassetur breve*. To do so he ought strictly to make up the record, but in practice this is not done, the plaintiff only delivering a copy of the entry entitled in the court and cause to the defendant's attorney as if it were an ordinary pleading. If this course be adopted, the form given by this section will not be applicable to the new action, but the declaration will commence in the ordinary form.

Declaration for libel or slander.

61. In actions of libel and slander the plaintiff shall be at liberty to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense without any prefatory averment to show how such words or matter were used in that sense, and such averment shall be put in issue by the denial of the alleged libel or slander; and where the words or matter set forth, with or without the alleged meaning, show a cause of action, the declaration shall be sufficient.

Formerly when a libel or slander stated in direct terms that which by law was in itself actionable, there was no difficulty in declaring. But when the expressions used were only actionable when taken in connection with other precedent facts, it had become necessary to allege those facts in the declaration, and to show that the expressions complained of were used in reference to them, so that the meaning imputed by the plaintiff to the expressions used (technically the *innuendo*) might not only be explained, but appear to be warranted. This gave rise to many difficulties, and in numerous instances judgment has been arrested, because the *innuendo* has not been supported by the prefatory statements, though the jury had found that the libellous meaning alleged had been intended by the defendant. This technical pleading is no longer the reproach of the law of libel; and the alteration effected by this section seems to be best capable of illustration by stating an actual case.

In *Alexander* v. *Angle* (1 C. & J. 143), the introductory averment was that the plaintiff was a livery stable-keeper, and that one F. P. had become bankrupt, and the plaintiff was about to prove a debt justly due to him under the commission of bankrupt. The words used by the defendant, and relied upon as actionable, were, "You (the plaintiff) are a regular prover under bankruptcies." The *innuendo* was, that the plaintiff was accustomed to prove fictitious debts under commissions of bankrupt. This was held bad, as not warranted by the inducement; but if that inducement had been that a conversation had taken place with reference to the proof of *fictitious* debts, the declaration might (the court admitted) have been good.

In Schedule B., No. 33, *post*, is given a form of a declaration in libel, founded evidently on this case.

See, as to the application of this section, *Galwey* v. *Marshall* (9 Exch. 294); *Hemmings* v. *Gasson* (E. B. & E. 346; L. J. 27, Q. B. 252).

Pleas and Subsequent Pleadings.

And as to pleas and subsequent pleadings, be it enacted as follows:—

62. No rule to plead or demand of plea shall be necessary, and the notice to plead indorsed on the declaration or delivered separately shall be sufficient.

Rules to plead and demand of plea abolished.

After the lapse of a year from the last proceeding in the cause, a defendant is entitled to a calendar month's notice of the plaintiff's intention to proceed, R. G., H. T. 1853, r. 176, *post*.

Term's notice of proceedings.

The want of notice to plead, which is substituted for the old rule to plead, is an irregularity; and a judgment signed for want of a plea may be set aside. Yet where a declaration was endorsed "to plead in ——," it was held that it should be understood to mean within the number of days allowed by the rules of the court, and the court refused to set aside a judgment signed in default of a plea (*Hifferman* v. *Langelle*, 2 B. & P. 363). A notice which gives less time than the defendant is entitled to would be irregular (s. 63, n., *infra*). The defendant may waive an irregularity in the notice, as by taking out and serving a summons for time to plead (*Bolton* v. *Manning*, 5 Dowl. 769. See *Pearson* v. *Reynolds*, 4 East, 571; *Nias* v. *Spratley*, 4 B. & C. 386).

Irregular notice.

63. In cases where the defendant is within the jurisdiction, the time for pleading in bar, unless extended by the court or a judge, shall be eight days; and a notice requiring the defendant to plead thereto in eight days, otherwise judgment, may, whether the declaration be delivered or filed, be indorsed upon the declaration or delivered separately.

Time for pleading, where defendant is within jurisdiction, to be eight days.

This section is confined to pleas *in bar*, so that pleas in abatement must still be pleaded within four days (see p. 39, *ante*). After judgment of respondeat ouster, a defendant had only four days to plead in bar (*Cantwell* v. *Earl of Stirling*, 1 Dowl. 265);

How computed.

and this section does not seem to alter such practice. The eight days are reckoned exclusively of the day on which the notice is given, and inclusively of the day on which it expires, unless the last day is a Sunday, Christmas-day, Good Friday, or a public fast or thanksgiving day, when such last day is also excluded (R. G., H. T. 1853, r. 174, *post*; *Ryland* v. *Wormald*, 5 Dowl. 581). Neither will a legal holiday be reckoned (*Wheeler* v. *Green*, 7 Dowl. 194). Sunday, if not the last day, is counted as one of the days (*Shoebridge* v. *Irvin*, 6 Dowl. 126).

The days between Thursday next before and Wednesday next after Easter-day and Christmas-day, and the three following days, are not reckoned in any proceedings except notices of trial and of inquiry (R. G., H. T. 1853, r. 175, *post*).

See as to delivering pleas up to 11 a. m. (the hour at which the judgment office opens), on the day following the last day on which they were due, *Connelly* v. *Bremner* (L. R. 1, C. P. 557).

Long Vacation.

The 2 Will. 4, c. 39, provides that no plea shall be delivered between the 10th of August and the 24th of October. A plea delivered within this period is a nullity, and the plaintiff may, after the time for pleading has expired, sign judgment (*Mills* v. *Brown*, 9 Dowl. 151). By a rule of court, E. T. 1856 (*post*), service of pleadings, notices, &c., if not made before 7 p. m. (on Saturdays, 2 p. m.), is to be taken as of the following day. By another rule of court (R. G., H. T. 1853, r. 9, *post*), if the time for pleading has not expired *before* the 10th of August, the defendant has the same number of days for pleading after the 24th of October, as if the declaration had been delivered on the 24th of October. Where the time for pleading expires before the 10th of August, the plaintiff is at liberty to sign judgment at any time between the 10th of August and the 24th of October (*Morris* v. *Hancock*, 1 Dowl. N. S. 320). In a case where the time for pleading expired on Saturday the 9th August, and the defendant delivered his plea on that day, but after two o'clock, p. m. Bramwell, B., refused to set aside judgment signed on the 12th (*Sharp* v. *Fox*, 1 H. & N. 496); but see *Connelly* v. *Bremner* (*ubi supra*). If the time for pleading expires *on* the 10th of August, judgment cannot be signed till the expiration of the time limited for pleading after the 24th of October; in other words, the time for pleading begins to run afresh from the 24th of October (*Morris* v. *Hancock*, *ubi supra*; *Severin* v. *Leicester*, 12 Q. B. 949). The rule applies where *time to plead* has been given (*Wilson* v. *Bradslocke*, 2 Dowl. 416). So that when an order for time to plead is applied for, it should be opposed, unless it is drawn up so as to exclude the operation of the rule.

After amendment.

As to the time for pleading after amendment of the declaration, see s. 90 (*post*, p. 85). After an order for security for costs, with a stay of proceedings, if the time has expired, the plaintiff in the Common Pleas cannot sign judgment till the day after security is given (*Decker* v. *Thompson*, 3 B. & P. 319). If the time is unexpired, the defendant has the same time as remained unexpired when the summons for security was attendable, or the rule *nisi* for it served.

After particulars delivered.

By a rule of court (R. G., H. T. 1853, r. 21, *post*), a defendant is allowed the same time for pleading after the delivery of particulars under a judge's order, that he had at the return of the

summons unless otherwise provided for by the order. If a summons for particulars is taken out, the time for pleading runs on until it is returnable, when it ceases to run, until it is in due course disposed of. If particulars be ordered, the time for pleading ceases to run until these are delivered. If the summons is dismissed, the time forthwith runs on. In a summons for particulars, the defendant should, at the same time, apply for "further time to plead," and get it made part of the order that that time be "after delivery of particulars." For the practice of the courts, see note to *Adams* v. *Drummond* (1 Dowl. 99). If a summons is taken out for time to plead, and is dismissed, the party has the remainder of the day on which it is dismissed to plead (*Mengens* v. *Perry*, 15 M. & W. 537; *Evans* v. *Senior*, 4 Exch. 818). A summons for time, or for particulars should be made returnable before the time for pleading expires, or at least before judgment for want of a plea can be signed (*Glen* v. *Lewis*, 8 Ex. 132; L. J. 22, Ex. 24).

A defendant who has a day's time to plead after the happening of an event, has the whole of the day following that on which the event happens in which to plead (*Connelly* v. *Bremner*, L. R., 1 C. P. 557).

As to the notice to plead, see s. 62 (*ante*, p. 65).

If the plaintiff gives the defendant more time to plead than he is entitled to, the defendant is entitled to the time so given (*Solomon* v. *Parker*, 2 Dowl. 405). A notice giving less time than the defendant is entitled to would be irregular, and judgment signed for want of a plea might be set aside, upon an application for that purpose made within the time allowed for pleading (*Maty* v. *Baldock*, Barnes, 302). In this case a fresh notice should be given.

As to the time in which a plaintiff must reply, see s. 53, n. (*ante*, p. 56).

Express colour abolished.

64. Express colour shall no longer be necessary in any pleading.

Special traverses abolished.

65. Special traverses shall not be necessary in any pleading.

Formal commencement and prayer of judgment unnecessary.

66. In a plea or subsequent pleading it shall not be necessary to use any allegation of actionem non, or actionem ulterius non, or to the like effect, or any prayer of judgment, nor shall it be necessary in any replication or subsequent pleading to use any allegation of precludi non, or to the like effect, or any prayer of judgment.

Commencement of plea.

67. No formal defence shall be required in a plea, or avowry, or cognizance, and it shall commence as follows, or to the like effect:

"The defendant by his attorney [*or* 'in person,' *or as the case may be*,] says that [*here state first defence*],"

and it shall not be necessary to state in a second or other plea, or avowry, or cognizance, that it is pleaded by leave of the court or a judge, or according to the

form of the statute, or to that effect; but every such plea, avowry or cognizance shall be written in a separate paragraph, and numbered, and shall commence as follows, or to the like effect:

"And for a second [*&c.*] plea, the defendant says, that [*here state second, &c. defence*];"

or if pleaded to part only, then as follows, or to the like effect:

"And for a second [*&c.*] plea to [*stating to what it is pleaded*], the defendant says that," *&c.*

and no formal conclusion shall be necessary to any plea, avowry, cognizance or subsequent pleading.

A material variation from the prescribed form may afford ground for an application to set aside the plea (see s. 59, n., *ante*, p. 60). Thus the omission to state whether the defendant pleads in person, or by attorney, is irregular, and is a ground for setting aside the plea, or for an amendment at the defendant's cost. A plea pleaded in the name of a person who is not an attorney, is not, it seems, a nullity (*Hill* v. *Mills*, 2 Dowl. 696). It might be set aside as irregular.

But the court will not set aside a plea as irregular on the ground of its having an informal commencement (*Bacon* v. *Ashton*, 5 Dowl. 94).

Where pleaded to part only of declaration.

If a plea be pleaded to one count only of a declaration, it ought to be so framed, otherwise it will be taken to be pleaded to the whole declaration (*Putney* v. *Swan*, 2 M. & W. 72). If a plea profess to answer the whole declaration, but the matter pleaded answer only a part, the plaintiff may demur (1 Wms. Saund. 28 a (3); and see *Eddison* v. *Pigram*, 16 M. & W. 137; *Chappell* v. *Davidson*, 18 C. B. 194). If a plea began as an answer to a part, and contained in the body an answer to the whole, it might formerly have been demurred to specially (*Gray* v. *Pindar*, 2 B. & P. 427). Now, unless amended under s. 52 (*ante*, p. 52), the plaintiff may perhaps sign judgment to the part not answered in the beginning (1 Wms. Saund. *ubi supra*).

Plea of matter subsequent to action.

68. Any defence arising after the commencement of any action shall be pleaded according to the fact, without any formal commencement or conclusion; and any plea which does not state whether the defence therein set up arose before or after action shall be deemed to be a plea of matter arising before action.

See *Gresty* v. *Gibson* (L. R. 1, Ex. 112); *Brooks* v. *Jennings* (L. R., 1 C. P. 476).

A plea containing a defence arising after action may be pleaded together with pleas of defences arising before action, but the plaintiff may, by confessing such plea, entitle himself to the costs of the cause up to the plea (R. Pl., T. T. 1853, r. 22, *post*). A plea *puis darrein continuance* may be confessed by the plaintiff with similar result as to costs; but these provisions do not apply

in the case of pleas pleaded by one of several defendants (R. Pl., T. T. 1853, r. 23, *post*). These rules have been held to apply in the case of a confession of a plea of a plaintiff's conviction of felony (*Barnett* v. *London and North Western Railway Company*, 5 H. & N. 604; L. J. 29, Ex. 334; see also *Plummer* v. *Hedge*, L. J. 24, Q. B. (Bail Court) 24; *Hill* v. *Howell*, Q. B., T. T. 1860, Law Times, 26 May, 1860, p. 130; *Cooke* v. *Hopewell*, 11 Exch. 555; *Morgan* v. *Harding*, 11 W. R. 65, Q. B., M. T. 1862; and notes to following section). *R. Pl., T. T. 1853, rr. 22, 23.*

69. In cases in which a plea puis darrein continuance has heretofore been pleaded in banc or at nisi prius, the same defence may be pleaded, with an allegation that the matter arose after the last pleading; and such plea may, when necessary, be pleaded at nisi prius, between the tenth of August and twenty-fourth of October; but no such plea shall be allowed, unless accompanied by an affidavit that the matter thereof arose within eight days next before the pleading of such plea, or unless the court or a judge shall otherwise order. *Plea puis darrein continuance, when and how to be pleaded.*

See R. Pl., T. T. 1853, rr. 22, 23, *post*, and notes.

A plea *puis darrein continuance* may be pleaded at any time before verdict, even after the jury have retired to consider their verdict (*Pearson* v. *Parkins*, Bul. N. P. 310). There can be but one plea of this nature (Bul. N. P. 312). If pleaded after a demurrer it operates as a *retraxit* of the demurrer (*Stoner* v. *Gibbons*, Moore, 871; and *Solomon* v. *Graham*, 6 E. & B. 609). *Plea puis darrein continuance.*

By pleading this plea the defendant abandons all his former pleas (*Barber* v. *Palmer*, 1 Salk. 178). It may be pleaded if any issue remains to be tried, although on other issues the plaintiff has already obtained judgment (*Wagner* v. *Imbrie*, 6 Exch. 380).

If pleaded at Nisi Prius, it must be delivered to the judge, not to the attorney of the opposite party (*Payne* v. *Shenstone*, 4 D. & L. 396). And the judge has no discretion, if it is good in form and accompanied with a proper affidavit, but to receive it (*Corporation of Ludlow* v. *Tyler*, 7 C. & P. 537). See a curious plea *puis darrein continuance* in *Todd* v. *Emly* (9 M. & W. 606), in which case the judge dispensed with an affidavit. *How pleaded.*

If pleaded at Nisi Prius, it must be certified on the back of the record and returned to the court (*Townsend* v. *Smith*, 1 C. & K. 160), when the plaintiff may reply or demur as in other cases (*Corporation of Ludlow* v. *Tyler, ubi supra*). It cannot be replied to at Nisi Prius (*Pascall* v. *Horsley*, 3 Car. & P. 372). *How replied to.*

If the plaintiff replies or demurs, the defendant, if successful, will not be entitled to costs incurred prior to the plea (*Littleton* v. *Cross*, 4 B. & C. 117).

The plea must be pleaded within eight days after the matter of defence has arisen, unless the court or a judge otherwise orders. An order was made for leave thus to plead after the lapse of a considerable period; it being shown that the omission *Time for pleading.*

to plead within the time prescribed had not arisen from any culpable conduct on the part of the defendant, and had occasioned no disadvantage to the plaintiff (*Payne* v. *Shenstone*, *ubi supra*; *Dunn* v. *Loftus*, 8 C. B. 76).

What may be thus pleaded.

A release from the plaintiff,—that he has become a bankrupt or an insolvent, a plea now pleadable eight days after the assignees decline to continue the action and give security for costs (s. 142, *post*),—the bankruptcy of the defendant,—in an action by an administrator, that the letters of administration have been revoked,—the conviction of the plaintiff of felony (*Barnett* v. *London and North Western Railway Company*, 5 H. & N. 604; L. J. 29, Exch. 334),—the plaintiff's having become an alien enemy through a declaration of war (*Alcinous* v. *Nigren*, 4 E. & B 217),—are instances of cases in which this plea may be pleaded. The plea of abatement by the coverture of the plaintiff is taken away (s. 141, *post*).

As to pleading the bankruptcy or insolvency of the plaintiff, see s. 142, *post*.

A plea *puis darrein continuance* is in abatement or in bar, as in other cases.

If pleaded at Nisi Prius the plea ought to show that it is pleaded before the presiding judge.

The plea must be accompanied by an affidavit, unless the court or a judge otherwise orders, as in the case of *Todd* v. *Emly* (*ubi supra*); and, if the plea be pleaded at Nisi Prius, it must be sworn before the presiding judge (*Bartlett* v. *Leighton*, 3 C. & P. 408). When the affidavit referred to the plea thereunto annexed, but was not itself entitled in the cause, it was held sufficient in form (*Prince* v. *Nicholson*, 5 Taunt. 333).

See notes to s. 18 (*ante*, p. 17 *et seq.*); and, generally, Chitt. Pr. 12th ed. vol. ii. pp. 919—923.

Payment into court in certain actions.

70. It shall be lawful for the defendant in all actions (except actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation or debauching of the plaintiff's daughter or servant), and by leave of the court or a judge, upon such terms as they or he may think fit, for one or more of several defendants to pay into court a sum of money by way of compensation or amends: provided that nothing herein contained shall be taken to affect the provisions of a certain act of parliament passed in the session of parliament holden in the sixth and seventh years of the reign of her present Majesty, intituled, "An Act to amend the Law respecting defamatory Words and Libel."

The effect of a plea of payment into court is to admit a cause of action, and that damages to the amount paid in have been sustained by the plaintiff. It does not necessarily admit *the* cause of action alleged in the declaration (*Story* v. *Finnis*, 6 Exch. 123; *Knight* v. *Egerton*, 7 Exch. 407; *Schreger* v. *Carden*, 11 C. B. 851; *Perren* v. *Monmouth Railway Company*, 11 C. B. 855).

Payment of money into court in satisfaction of damages may be made by one tenant in common, in an action in trespass brought by his co-tenant for destruction of the common property (*Cresswell* v. *Hedges*, 1 H. & C. 421; L. J. 31, Ex. 497).

Particulars of intended appropriation were ordered by the Court of Exchequer, Bramwell, B. *dubitante*, in *Baxendale* v. *Great Western Railway Company* (6 H. & N. 95; L. J. 30, Ex. 63); but in a later case (*Thames Iron Works and Ship Building Company* v. *Royal Mail Steam Packet Company*, 10 C. B., N. S. 375; L. J. 30, C. P. 265) they were refused by the Court of Common Pleas, and the former case distinguished, if not disapproved.

In what actions.

The term "all actions" is sufficiently large to include detinue, in which, however, the defendant usually applies to a judge to stay proceedings on his giving up the chattels, and paying nominal damages and costs; and if the plaintiff insists upon going on for substantial damages, it may be made part of the order, that unless he recovers more than nominal damages, he shall pay the costs of the action; and terms may be put on both parties (*Phillips* v. *Howard*, 3 Dowl. 362). Analogous proceedings may be had in trover (*Peacock* v. *Nicholls*, 8 Dowl. 367). It has accordingly been held, that payment into court may be made in respect of damages claimed (*Crossfield* v. *Such*, 8 Exch. 159); but it could not be made so as to defeat the plaintiff's claim for a return of his goods under the C. L. P. A, 1854, s. 78, *post*, (*Allen* v. *Dewes*, L. J. 26, Ex. 185). If, therefore, in detinue, the plaintiff proceeded only for damages for the detention, this plea was applicable; otherwise not. These words also include trover, in which payment into court could not formerly be pleaded (*England* v. *Watson*, 1 Dowl. N. S. 398; *Key* v. *Thimblebey*, 6 Exch. 692).

It has been held (*Bishop of London* v. *M'Neil*, 9 Exch. 490), that it does not warrant payment into court on a bond within the 8 & 9 Will. 3, c. 11.* (See as to money bonds, 4 & 5 Ann. c. 16, s. 12,† and *England* v. *Watson*, 9 M. & W. 333.)

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* 8 & 9 Will. 3, c. 11, s. 8. That in all actions which shall be commenced or prosecuted in any of His Majesty's Courts of Record, upon any bond or bonds, or on any penal sum for nonperformance of any covenants or agreements in any indenture, deed or writing contained, the plaintiff or plaintiffs may assign as many breaches as he or they shall think fit, and the jury, upon trial of such action or actions, shall and may assess not only such damages and costs of suit as have heretofore been usually done in such cases, but also damages for such of the said breaches so to be assigned as the plaintiff upon the trial of the issues shall prove to have been broken, and that the like judgment shall be entered on such verdict as heretofore hath been usually done in such like actions; and if judgment shall be given for the plaintiff on a demurrer, or by confession, or *nihil dicit*, the plaintiff upon the roll may suggest as many breaches of the covenants and agreements as he shall think fit, upon which shall issue a writ to the sheriff of that county where the action shall be brought, to summon a jury to appear

† 4 & 5 Ann. c. 16, s. 12. And be it further enacted, by the authority aforesaid, that if, at any time pending an action upon any such bond with a penalty, the defendant shall bring into the court where the action shall be depending all the principal money and interest due on such bond, and also all such costs as have been expended in any suit or suits, in law or equity, upon such bond, the said money so brought in shall be deemed and taken to be in full satisfaction and discharge of the said bond, and the court shall and may give judgment to discharge every such defendant of and from the same accordingly.

C. L. P. A. 1860, ss. 23—25.

Now by the C. L. P. A. 1860, s. 25 (which see, *post*), payment into court may be made (by leave of the court or a judge) in actions on common money bonds, and in detinue. And payment into court may now be made by plaintiffs in actions of replevin.

In actions under Lord Campbell's Act, 9 & 10 Vict. c. 93, the defendant was obliged to pay into court a separate sum in respect of the claim of each of the persons entitled to compensation; but this difficulty under which the defendant laboured has been now removed by stat. 27 & 28 Vict. c. 95, s. 2, which enacts that he may pay money into court as a compensation in one sum to all persons entitled under the former act without specifying the shares into which it shall be divided by the jury, and if the sum be not accepted and an issue be taken by the plaintiff as to its sufficiency and the jury shall think the same sufficient, the defendant shall be entitled to the verdict upon that issue.

In respect of one of several counts.

The defendant may pay money into court in respect of one or more of several counts (*Fulwell* v. *Hall*, 2 Wm. Bl. 837; *Hallett* v. *East India Company*, 2 Burr. 1120). So he may in respect of all the counts, and it is not necessary to specify how much is paid to one count, how much to another (*Marshall* v. *Whiteside*, 4 Dowl. 766), except there are counts on a bill or note, when the plea must specify how much of the money paid in applies to the bill or note (*Jourdain* v. *Johnson*, 2 C. M. & R. 564, and *Tattersall* v. *Parkinson*, 16 M. & W. 752). So he may in respect of a part of a count (s. 71, *post*, p. 74).

Where two actions were brought for the same cause of action against two co-contractors, and in one of them the defendant had paid 300*l.* into court, the court allowed the other defendant to plead payment into court of that sum, without his actually

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before the justices or justice of assize or nisi prius of that county, to inquire of the truth of every one of those breaches, and to assess the damages that the plaintiff shall have sustained thereby; in which writ it shall be commanded to the said justices or justice of assize or nisi prius, that he or they shall make a return thereof to the court from whence the same shall issue, at the time in such writ mentioned; and in case the defendant or defendants, after such judgment entered, and before any execution executed, shall pay into the court where the action shall be brought, to the use of the plaintiff or plaintiffs, or his or their executors or administrators, such damages so to be assessed by reason of all or any of the breaches of such covenants, together with the costs of suit, a stay of execution of the said judgment shall be entered upon record; or if, by reason of any execution executed, the plaintiff or plaintiffs, or his or their executors or administrators, shall be fully paid or satisfied all such damages so to be assessed, together with his or their costs of suit, and all reasonable charges and expenses for executing the said execution, the body, lands or goods of the defendant shall be thereupon forthwith discharged from the said execution, which shall likewise be entered upon record; but notwithstanding in each case such judgment shall remain, continue and be as a further security, to answer to the plaintiff or plaintiffs, and his or their executors or administrators, such damages as shall or may be sustained for further breach of any covenant or covenants in the same indenture, deed or writing contained, upon which the plaintiff or plaintiffs may have a *scire facias* upon the said judgment against the defendant, or against his heir, terre-tenants, or his executors or administrators, suggesting other breaches of the said covenants or agreements, and to summon him or them respectively to show cause why execution should not be had or awarded upon the said judgment, upon which there shall be the like proceeding as was in the action of debt, upon the said bond or obligation for assessing of damages upon trial of issues joined upon such breaches, on inquiry thereof upon a writ to be awarded in manner as aforesaid; and that upon payment or satisfaction in manner as aforesaid, of such future damages, costs and charges as aforesaid, all further proceedings on the said judgment are again to be stayed, and so *toties quoties*, and the defendant, his body, lands or goods, shall be discharged out of execution as aforesaid.

paying it in (*Rendall* v. *Mallison*, 16 M. & W. 828, Alderson, B.); *sed quære.*

No other defence permitted.

The defendant will not be allowed to plead any other defence to that part of the declaration to which the plea of payment into court applies (*Thomson* v. *Jackson*, 8 Dowl. 591; *Hart* v. *Denny*, 1 H. & N. 609). He must plead the plea of payment into court; if it is to a part of the declaration, to such part only (s. 71, *post*, p. 74). The plea may be amended, and in one case where money was paid into court in mistake, it was allowed to be withdrawn (*Webster* v. *Emery*, 10 Ex. 901; L. J. 24, Ex. 186, Exch. Ch.)

One of several defendants may, by leave of the court or a judge, pay money into court. It had not been the practice to allow this; the case above mentioned of two actions being brought against co-contractors is different from the case of co-defendants (see *Kay* v. *Panchiman and others*, 2 Wm. Bl. 1029).

Subject to the exceptions in the statute and to the above observations, the defendant may pay money into court in all actions. The exception does not extend to an action for assault and battery of the plaintiff's servant (*Newton* v. *Holford*, 2 D. & L. 554). The exceptive clause "means actions where the injury to the plaintiff is the subject of the action. When the assault is upon some member of the plaintiff's family, or person in his service, the gist of the action is the loss sustained, and the case is not within the exception."

Amount to be paid.

Amendment of plea.

The sum to be paid into court ought to be the amount claimed, and, in the case of a debt, with interest down *to the day of payment* into court (*Kidd* v. *Walker*, 1 Dowl. 331). A plea of payment into court may be amended, and a further sum allowed to be paid in on application to a judge (*Domett* v. *Young*, Car. & Mar. 465); and see as to such a plea being withdrawn (*Webster* v. *Emery*, *ubi supra*).

Proviso as to 6 & 7 Vict. c. 96, s. 2.

The proviso in the concluding part of this section relates to the second section of the statute there mentioned, which provides, that in an action for a libel contained in any newspaper or periodical publication, the defendant may plead that such libel was inserted without actual malice, and without gross negligence, and that before action, or at the earliest opportunity, he inserted in such newspaper or publication a full apology, or, if the newspaper or publication should be published at intervals exceeding one week, had offered to publish the said apology in any newspaper or periodical publication to be selected by the plaintiff; and that every such defendant shall, upon filing such plea, be at liberty to pay into court a sum of money by way of amends for the injury sustained by the publication of such libel, and such payment into court shall be of the same effect, and be available in the same manner and to the same extent, and be subject to the same rules and regulations as to payment of costs and the form of pleading, as if actions for libel had not been excepted from the personal actions in which it is lawful to pay money into court. To such plea it is competent to the plaintiff (by the same section) to reply generally, denying the whole of such plea.

The special plea of apology and payment given by this statute cannot be pleaded with not guilty to the same part of the declaration (*O'Brien* v. *Clement*, 15 M. & W. 435). See upon this plea, *Lefone* v. *Smith* (3 H. & N. 735; L. J. 27, Ex. 33; and 4 H. & N. 158).

Payment into court, how pleaded.

71. When money is paid into court, such payment shall be pleaded in all cases, as near as may be, in the following form, *mutatis mutandis*:—

"The defendant, by his attorney [*or* in person, *&c.*] [*if pleaded to part, say*, as to £ parcel of the money claimed], brings into court the sum of £ and says that the said sum is enough to satisfy the claim of the plaintiff in respect of the matter herein pleaded to."

The words "*as near as may be*" only authorize such alterations as may be necessary in order to adapt the plea to the names of the parties, to the form of action, to the sum paid, and the like (*Aston* v. *Perkes*, 15 M. & W. 385).

The word "claim" covers a demand of any nature.

Justices and others paying money into court under particular statutes need not state in the plea the character in which they make the payment (*Aston* v. *Perkes*, *ubi supra*, where many statutes are referred to; *Key* v. *Thimblebey*, 6 Exch. 692; *Thompson* v. *Sheppard*, 4 E. & B. 53). The form of the plea given in the foregoing section should be adhered to, and the character or special circumstances of the payment should not be set out (*Thompson* v. *Sheppard*, *ubi supra*).

No order to pay money into court.

72. No rule or judge's order* to pay money into court shall be necessary, except in the case of one or more of several defendants, but the money shall be paid to the proper officer of each court, who shall give a receipt for the amount in the margin of the plea, and the said sum shall be paid out to the plaintiff or to his attorney, upon a written authority from the plaintiff on demand.

The defendant should take care to have the officer's receipt on the margin of the plea, as the omission may afford ground for application to set aside the plea for irregularity (*Harson* v. *Busk*, Har. Dig. 7358). Taking the money out of court is a waiver of any irregularity in paying it in (*Griffiths* v. *Williams*, 1 T. R. 710).

If the plaintiff dies, the money will be paid out only to his legal representative (*Palmer* v. *Reippenstein*, 1 M. & G. 94).

See note to following section.

Proceeding by plaintiff after payment into court.

73. The plaintiff, after the delivery of a plea of payment of money into court, shall be at liberty to reply to the same by accepting the sum so paid into court in full satisfaction and discharge of the cause of

* A rule or judge's order is required in the case of payment into court in actions on money bonds, and in detinue, under C. L. P. A. 1860, s. 25, *post*.

action in respect of which it has been paid in, and he shall be at liberty in that case to tax his costs of suit, and, in case of nonpayment thereof within forty-eight hours, to sign judgment for his costs of suit so taxed, or the plaintiff may reply that the sum paid into court is not enough to satisfy the claim of the plaintiff in respect of the matter to which the plea is pleaded; and, in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit.

Replication taking money out of court.

This section prescribes the forms of the plaintiff's replication, which should be delivered within the time limited in ordinary cases (s. 53, *ante*, p. 55). If the plea be pleaded to the whole declaration, and the plaintiff determines upon accepting the money in satisfaction of the action, he should reply in the terms pointed out by the section. And upon doing so he may at once proceed to tax his costs, and sign judgment if they are not paid within forty-eight hours after taxation.

A written authority from the plaintiff to his attorney is required before the latter can get the money out of court; but no affidavit to verify such authority is ordinarily required (R. G., H. T. 1853, r. 11, *post*). See as to costs, R. G., H. T. 1853, r. 12, 13, *post*, and *Harold* v. *Smith* (5 H. & N. 381, L. J. 29, Ex. 141).

The following regulation was issued in the Queen's Bench in June, 1854:—

"The Common Law Procedure Act requires an authority to be signed by the plaintiff authorizing his (her or their) attorney to receive the money out of court.

"It is requested that the authority be in something of the following form, viz.:—

In the Queen's Bench.

Between *A. B.*, plaintiff,

v.

C. D., defendant.

I hereby authorize Mr. *E. F.*, my attorney, to receive out of court the sum of £ paid in on the day of by the defendant in this cause. Dated the day of .

(Signed) *A. B.*,

The above-named plaintiff.

To the Masters of the Court of Queen's Bench.

"In agency cases the agent must be described as the attorney.

"It is requested that parties should furnish themselves with the necessary receipt stamp on leaving their papers one day for the next.

"Where the plaintiff is out of the jurisdiction it is necessary that a judge's order should be obtained."

Replication of damages ultra.

If the plea be pleaded to the whole declaration, but the plaintiff determines upon not accepting the money in satisfaction, he should reply in the other alternative of the section, and make up and deliver the issue as in ordinary cases.

If the plea be pleaded to a part only of the declaration, and there are other pleas to the residue, (if there are not, the plain-

tiff may sign judgment for such unanswered part,) the plaintiff must determine whether he will be satisfied, or go on with the action.

Replication with a nolle pros.

If he determines on accepting the sum paid into court in satisfaction of the action, he may reply that he accepts the sum paid into court in satisfaction of that part of the declaration to which the plea is pleaded. If he does so, he must at the same time add a *nolle prosequi* as to the residue, otherwise the defendant may sign judgment of *non pros.* (*Emmett* v. *Standen*, 6 Dowl. 591).

Upon this, the plaintiff may proceed to tax his costs, and sign final judgment if the same are not paid within forty-eight hours after taxation (*Rumbelow* v. *Whalley*, 16 Q. B. 397, L. J. 20, Q. B. 262). The defendant will be entitled to the costs of that part of the declaration and plea or pleas to which the *nolle pros.* is entered (*Coodee* v. *Goldsmith*, 5 Dowl. 288).

If, although he accepts the money paid into court in satisfaction of the causes of action to which it is pleaded, he yet determines to proceed with the action for the remaining causes of action, then, instead of entering a *nolle pros.*, he must reply to the other pleas of the defendant, and in this case he will not be entitled to tax his costs (*Cauty* v. *Gill*, 4 M. & G. 907), until the determination of the action; when he will be entitled in any event to the costs in respect of the claim so satisfied (R. G., H. T. 1853, r. 12, *post*). Where in an action for work and labour, after issue joined part of the money claimed was paid into court, but the plaintiff continued the action for the residue, and failed at the trial, it was held that he was not entitled to the costs of the brief (*Harold* v. *Smith*, *ubi supra*).

The defendant is only entitled to costs where there is a *nolle prosequi* as to part; or where he is successful either upon other issues, or upon a replication of *damages ultra*. As to costs of issues generally, see s. 81 (*post*, p. 80).

Pleas to actions partaking both of breach of contract and wrong.

74. Whereas certain causes of action may be considered to partake of the character both of breaches of contracts and of wrongs, and doubts may arise as to the form of pleas in such actions, and it is expedient to preclude such doubts: any plea which shall be good in substance shall not be objectionable on the ground of its treating the declaration either as framed for a breach of contract, or for a wrong.

Payment, set-off and other pleadings which can be construed distributively shall be so construed

75. Pleas of payment of and set-off, and all other pleadings capable of being construed distributively, shall be taken distributively, and if issue is taken thereon, and so much thereof as shall be sufficient answer to part of the causes of actions proved shall be found true by the jury, a verdict shall pass for the defendant in respect of so much of the causes of action as shall be answered, and the plaintiff in respect of so much of the causes of action as shall not be so answered.

To have entitled a defendant to a verdict on a plea of payment of a sum certain, he must have proved payment of the whole sum (*Cousins* v. *Paddon*, 2 C. M. & R. 547). So, on a plea of set-off, the plaintiff was entitled to a verdict, unless the defendant proved a set-off, equalling the whole of the plaintiff's aggregate demand. The plea of set-off was not divisible (*Moore* v. *Butlin*, 7 A. & E. 595); but it was available (if it did not meet the whole demand) in reduction of damages (*Tuck* v. *Tuck*, 5 M. & W. 109; *Rogers* v. *Maw*, 15 M. & W. 444). "Pleadings" here means pleadings generally, and includes declarations; and the enactment applies to pleadings in all actions. See instances of verdicts entered, under the old practice, distributively in trespass, where a right of way was pleaded (*Knight* v. *Woore*, 5 Dowl. 201); in trespass *qu. cl. fr.* (*Phythian* v. *White*, 1 M. & W. 216); in case (*Giles* v. *Grover*, 12 Q. B. 721).

The effect of this enactment is, that pleas of payment and set-off, and all other pleadings capable of being construed distributively, are so construed; and the costs of the defendant, for instance, proving his part of the issue, is set-off against, or deducted from the costs of the plaintiff in maintaining the part found for him, as was formerly done under R., H. T., 2 Will. 4, r. 74. See *Treherne* v. *Gardner* (8 E. & B. 161); and *Reynolds* v. *Harris* (3 C. B., N. S. 267, L. J. 28, C. P. 26), in which latter, *Biddulph* v. *Chamberlayne* (17 Q. B. 351) is impeached; also *Davis* v. *Thomas* (5 Jur. N. S. 709, C. P. T. T. 1859).

It has been held (*Wilkinson* v. *Kirby*, 15 C. B. 439) that this section does not render a plea of "not possessed," to an action of trespass for mesne profits, distributable; and it has also been held (*Gabriel* v. *Dresser*, 15 C. B. 622) that part performance of an agreement, by way of accord and satisfaction of a whole cause of action, could not be pleaded distributively; (see upon this *Blagrave* v. *Bristol Waterworks Company*, 1 H. & N. 369; and *Cooper* v. *Parker*, 15 C. B. 822; but see also *Stears* v. *South Essex Gaslight and Coke Company*, 9 C. B., N. S. 180; L. J. 30, C. P. 49). On the other hand, a plea of "not possessed" in trover has been held distributable (*Freshney* v. *Wells*, L. J. 26, Ex. 228). The general issue "never indebted" has been held distributable (*Treherne* v. *Gardner*, *ubi supra*; see also *Chappell* v. *Davidson*, 18 C. B. 194; with *Blagrave* v. *Bristol Waterworks Company*, *ubi supra*; also *Lyne* v. *Siesfield*, 1 H. & N. 278; *Parr* v. *Jewell*, 16 C. B. 684; and *Bennett* v. *Thompson*, 4 W. R. 594, Q. B., E. T. 1856). Where upon an insurance of goods, part only of the goods is lost by perils of the sea, the issue upon a plea denying the loss is distributable (*Paterson* v. *Harrison*, 2 B. & S. 814, L. J. 31, Q. B. 277; in which case *Anderson* v. *Chapman*, 5 M. & W. 483, is discussed and distinguished, if not disapproved). See also sections 81 and 223, and notes, *post*.

Traverse of the declaration.

76. A defendant may either traverse generally such of the facts contained in the declaration as might have been denied by one plea, or may select and traverse separately any material allegation in the declaration, although it might have been included in a general traverse.

But a defendant ought not to traverse vexatiously every allegation open to a traverse. See observations of Lord Campbell

in *Cooling* v. *Great Northern Railway Company* (12 Q. B. 485); and *South-Eastern Company* v. *Hebblewhite* (12 A. & E. 497).

Traverse of plea or subsequent pleading of defendant.

77. A plaintiff shall be at liberty to traverse the whole of any plea or subsequent pleading of the defendant by a general denial, or, admitting some part or parts thereof, to deny all the rest, or to deny any one or more allegations.

The plaintiff may join issue, 1st, generally, under s. 79, *infra*; or, 2ndly, admitting part of a plea, deny the rest [as for instance, now that the plea of *set-off* is distributive (s. 75, *ante*, p. 76), instead of taking issue, plead the Statute of Limitations to one part, and deny the rest]; or 3rdly, traverse any one or more of the allegations of the plea. But this section does not dispense with a new assignment where it would previously have been necessary (*Glover* v. *Dixon*, 9 Exch. 157). *Quære*, whether this and the two following sections apply to a traverse by a plaintiff in replevin (see *Trent* v. *Hunt*, 9 Exch. 14; and C. L. P. A. 1860, s. 22, n. *post*).

It has been said that where the defendant avers in his plea a performance of conditions precedent generally, a general replication is a sufficient traverse by the plaintiff of the performance of any particular condition precedent on which he relies (*Tetley* v. *Wanless*, L. R. 2, Ex. 21, *per* Bramwell, B., *ante*, p. 59); *sed quære*.

Traverse of replication or subsequent pleading of the plaintiff.

78. A defendant shall be at liberty in like manner to deny the whole or part of a replication or subsequent pleading of the plaintiff.

See section 77, n. *supra*.

The defendant was formerly ruled to rejoin in the same way as a plaintiff was ruled to reply; but this rule is abolished (s. 53, *ante*, p. 55), and the plaintiff must give the defendant a notice to rejoin in the same way as he gives a notice to plead (s. 62, *ante*, p. 65). A *demand* of a rejoinder is not necessary. The notice may be endorsed on the replication, or delivered separately (s. 53, *ante*, p. 55).

Joinder of issue.

79. Either party may plead, in answer to the plea or subsequent pleading of his adversary, that he joins issue thereon, which joinder of issue may be as follows, or to the like effect :—

"The plaintiff joins issue upon the defendant's 1st [*&c., specifying what or what part*] plea."

"The defendant joins issue upon the plaintiff's replication to the 1st [*&c., specifying what*] plea :"

and such form of joinder of issue shall be deemed to be a denial of the substance of the plea or other subsequent pleading, and an issue thereon; and in all cases where the plaintiff's pleading is in denial of the pleading of the defendant, or some part of it, the

plaintiff may add a joinder of issue for the defendant.*

See section 77, n. (*ante*, p. 78.)

The joinder of issue, if *separately* pleaded, must comply with the provisions of s. 54 (*ante*, p. 56).

Notice of striking out similiter.

The defendant may strike out the joinder of issue, and plead or demur to the plaintiff's last pleading, within four days. If he does so, the practice is for him to give notice thereof to the plaintiff.

The joinder of issue added by the plaintiff is generally added in cases where he at once makes up and delivers the issue, with a notice of trial indorsed.

If the joinder in issue in such case is struck out, the plaintiff cannot proceed to trial. If the defendant does not plead within due time, the plaintiff's course is to sign judgment (*Twycross* v. *King*, 6 Q. B. 663).

As to pleading and demurring together.

80. Either party may by leave of the court or a judge, plead and demur to the same pleading at the same time, upon an affidavit by such party, or his attorney, if required by the court or judge, to the effect that he is advised and believes that he has just ground to traverse the several matters proposed to be traversed by him, and that the several matters sought to be pleaded as aforesaid by way of confession and avoidance are respectively true in substance and in fact, and that he is further advised and believes that the objections raised by such demurrer are good and valid objections in law; and it shall be in the discretion of the court or a judge to direct which issue shall be first disposed of.

The granting leave is quite in the discretion of the court or judge (*Thomas* v. *Knowles*, L. J. 24, Ex. 43).

The direction as to which issue shall be first disposed of should be part of the order. It still continues the privilege of the plaintiff, subject to the direction of the court, to select which issue shall be first decided (*Cruckuell* v. *Trueman*, 9 M. & W. 684). Where a defendant had pleaded and demurred, and the demurrer had been determined against him, an application by him to the Court of Queen's Bench to allow the trial of the issues of fact to stand over until after the demurrer was finally disposed of in the court of error was refused, the court being of opinion that this section applied only to the disposing of the issue by the court in which it is first raised, and the judgment on the demurrer had disposed of the issue in law finally as regarded that court (*Lumley* v. *Gye*, 2 E. & B. 216, L. J. 22, Q. B. 463).

In cases where the demurrer goes to the whole cause of action, the demurrer should be first argued; but that this may be done,

* In Schedule A. [*Replication*], *post*, the form given is that the plaintiff "takes issue," &c.: strictly speaking, a party joins issue upon a traverse, and takes issue upon an affirmative pleading.

the defendant should, it would appear, have the consent of the plaintiff, or a judge's order.

The court refused to compel a defendant, successful on demurrer, to enter a judgment of *nil capiat*, so as to enable the plaintiff to bring error without trying the issues in fact (*Hinton* v. *Acraman*, 3 C. B. 736).

Whether this and the following sections applied to replevin and to real actions, is now of little importance (C. L. P. A. 1860, s. 22, n., and s. 27, *post*); the cases upon this doubtful matter are collected in *Marshall* v. *Bishop of Exeter* (7 C. B., N. S. 653; L. J. 28, C. P. 300); see also *Reg.* v. *Seale* (5 E. & B. 1).

Several matters may be pleaded at any stage of the pleadings.

81. The plaintiff in any action may, by leave of the court or a judge, plead in answer to the plea, or the subsequent pleading of the defendant, as many several matters as he shall think necessary to sustain his action; and the defendant in any action may, by leave of the court or a judge, plead in answer to the declaration, or other subsequent pleading of the plaintiff, as many several matters as he shall think necessary for his defence, upon an affidavit of the party making such application or his attorney, if required by the court or judge, to the effect that he is advised and believes that he has just ground to traverse the several matters proposed to be traversed by him, and that the several matters sought to be pleaded as aforesaid by way of confession and avoidance are respectively true in substance and in fact; provided that the costs of any issue, either of fact or law, shall follow the finding or judgment upon such issue, and be adjudged to the successful party, whatever may be the result of the other issue or issues.

"Several matters" here means *distinct* answers or defences; see also Pl. R., T. T. 1853, rr. 2, 3, *post*.

The plaintiff in order to reply, or the defendant in order to plead several matters, always requires a judge's order, which is to be obtained on a summons, accompanied by an abstract of the intended replications or pleas.

As to the costs upon several issues, see R. G., H. T. 1853, r. 62, *post*, also *Reynolds* v. *Harris* (3 C. B., N. S. 267; L. J. 28, C. P. 26), and cases there cited.

The right given by this section to costs, applies only to the costs of issues in the cause, and not to such costs as those of trying a suggestion under the Malicious Trespass Act, 7 Geo. 4, c. 30, (*Norwood* v. *Pitt*, 5 H. & N. 501; L. J. 29, Ex. 486).

As to the time within which the plaintiff must reply, see s. 53, n. (*ante*, p. 56.)

The pleas which may be pleaded by the defendant, without leave, are enumerated in s. 84 (*post*, p. 82). Leave for the plaintiff to reply, or for the defendant to plead several matters, is not necessary, where the pleas taken altogether constitute but one answer to the preceding pleading (*Archer* v. *Garrard*, 6 Dowl. 132).

The 4 & 5 Anne, c. 16, s. 4, did not bind the Crown (*Att.-Gen.* v. *Donaldson*, 9 Dowl. 319); neither do the words of this section.

When leave to plead several matters may be refused.

Leave will be refused to plead pleas grossly inconsistent with each other (*Thomson* v. *Jackson*, 9 Dowl. 591), or vexatiously inconsistent (*Steel* v. *Sturry*, 3 Dowl. 133; *Cooling* v. *Great Northern Railway Company*, 15 Q. B. 485): though pleas merely inconsistent are not objectionable (*Wilkinson* v. *Small*, 3 Dowl. 564). A plea that is absurd will be disallowed (*Goodman* v. *Morrell*, 1 Dowl. N. S. 383); so will one that tenders an immaterial issue (*Murray* v. *Bomber*, 6 Dowl. 537); or one that is clearly bad (*Lofond* v. *Ruddock*, [rejoinder], 13 C. B. 813; L. J. 22, C. P. 217; *Capner* v. *Mincher*, 13 M. & W. 704); or one that is fraudulent, as a release by a co-plaintiff who has no real interest in the action (*Lascaridi* v. *Gurney*, 3 F. & F. 101, *per* Williams, J.); or pleas that only raise a point a second time upon the same pleadings (*Jenkins* v. *Creech*, 5 Dowl. 293; *Dawson* v. *M'Donald*, 2 M. & W. 26); or one that is not a substantial plea to the action (*South-Eastern Railway Company* v. *Hebblewhite*, 12 A. & E. 497; and *Needham* v. *Law*, 1 Dowl. N. S. 1027, where a traverse of the defendant's being a public registered officer of a company was not allowed to be pleaded with pleas to the merits). But as to this last case, see *Roe* v. *Fuller* (7 Exch. 220; L. J. 20, Ex. 104). See generally upon this subject, Ch. Pr. 12th ed., vol. i., pp. 279—289, where numerous cases of pleas allowed and disallowed are collected.

Affidavit of truth of pleadings.

The affidavit, if made by the party, should state that *he is advised* and believes; if by the attorney, it should state that *he is informed* or *instructed* and *is advised and believes* (*Rowbotham* v. *Dupree*, 1 Dowl. 537; *Schofield* v. *Huggins*, 3 Dowl. 427).

See as to sufficiency of affidavit, *Platt* v. *Elce* (8 Exch. 364), explaining *Lumley* v. *Gye* (L. J. 22, Ex. 9).

When the pleas delivered do not substantially correspond with those for which leave has been given, the plaintiff may sign judgment (*Hills* v. *Haymen*, 2 Exch. 323; *Bailey* v. *Baker*, 9 M. & W. 769; *Gabardi* v. *Harmer*, 3 Exch. 239; *Harvey* v. *Hamilton*, 4 Exch. 43; *Wills* v. *Robinson*, 5 Exch. 302; and s. 86, *post*, p. 82); but the defendant may ordinarily abandon any of the pleas that he has obtained leave to plead. The plaintiff may also sign judgment, if a plea, though allowed by a judge, is not issuable (*Capner* v. *Mincher*, 13 M. & W. 704). As to costs, see *Bentley* v. *Dawes* (10 Exch. 347; *S. C.* L. J. 23, Ex. 280); *Abley* v. *Dale* (11 C. B. 389); and *Dunston* v. *Peterson* (4 C. B., N. S. 279).

See ss. 84, 88 (*post*, pp. 82, 83).

Judges' order to plead several matters sufficient.

82. No rule of court for leave to plead several matters shall be necessary where a judge's order has been made for the same purpose.

A judge's order for leave to plead several matters should be obtained, and made attendable, before the time to plead has expired; otherwise judgment may be signed.

If a judge at chambers has refused to make an order (under s. 81, *supra*), the party seeking leave to plead several matters may come to the court (*Johnstone* v. *Knowles*, 1 Dowl. N. S. 30; *Griffith* v. *Selby*, 9 Exch. 393).

An application to review the decision of a judge at chambers should be made in the course of the term next after the decision has been given (*Meredith* v. *Gittens*, 18 Q. B. 257; L. J. 21, Q. B. 273; *Orchard* v. *Maxey*, 2 E. & B. 206; *Worman* v. *Halahan*, L. J. 30, Q. B. 48; *Oldham Manufacturing and Building Company* v. *Heald*, 3 H. & C. 132; L. J. 33, Ex. 236. And see further, C. L. P. A. 1860, s. 4, n., *post*).

Objections to pleadings to be heard on summons to plead several matters.

83. All objections to the pleading of several pleas, replication or subsequent pleadings, or several avowries or cognizances, on the ground that they are founded on the same ground of answer or defence, shall be heard upon the summons to plead several matters.

See Pl. R., T. T. 1853, r. 2, *post*. An appeal lies to the court (*Griffith* v. *Selby*, 9 Exch. 393).

Certain pleas may be pleaded together without leave.

84. The following pleas, or any two or more of them, may be pleaded together as of course, without leave of the court or a judge; that is to say, a plea denying any contract or debt alleged in the declaration; a plea of tender as to part; a plea of the Statute of Limitations, set-off, bankruptcy of the defendant, discharge under an insolvent act, *plene administravit*, *plene administravit præter*, infancy, coverture, payment, accord and satisfaction, release, not guilty, a denial that the property an injury to which is complained of is the plaintiff's*, leave and licence, son assault demesne, and any other pleas which the judges of the said superior courts, or any eight or more of them, of whom the chief judges of the said courts shall be three, shall by any rule or order, to be from time to time by them made in term or vacation, order or direct.

The plea of *non detinet* does not appear in the above list, but as this plea is substantially the same as that of "not guilty," or as "a plea denying a contract or debt alleged in the declaration," according as detinue is regarded as an action of tort or of contract, it is frequently pleaded together with any other of the pleas enumerated in this section without a judge's order.

The judges have not made any rule or order under the power given them by this section.

Signature of counsel.

85. The signature of counsel shall not be required to any pleading.

The signature of counsel is still required on some motions and rules.

For pleading several matters without

86. Except in the cases herein specifically provided for, if either party plead several pleas, replications,

* This word limits the plea to a traverse of the *plaintiff's* property; and therefore where it is intended to plead, along with any other plea, a denial that some offending thing belongs to the *defendant*, leave to plead several matters must be obtained.

avowries, cognizances, or other pleadings, without leave of the court or a judge, the opposite party shall be at liberty to sign judgment; provided that such judgment may be set aside by the court or a judge, upon an affidavit of merits, and such terms as to costs and otherwise as they or he may think fit.

leave, judgment may be signed.

See *Messiter* v. *Rose* (13 C. B. 162; L. J. 22, C. P. 78).
See note to s. 81 (*ante*, p. 80).

87. One new assignment only shall be pleaded to any number of pleas to the same cause of action; and such new assignment shall be consistent with and confined by the particulars delivered in the action, if any, and shall state that the plaintiff proceeds for causes of action different from all those which the pleas profess to justify, or for an excess over and above what all the defences set up in such pleas justify, or both.

One new assignment only allowed in respect of the same cause of action.

As to when a new assignment is necessary, see Bullen and Leake's Precedents of Pleadings, 2nd edit., *553—555*.
A new assignment is in the nature of a replication, and must be delivered within the same time (see s. *53*, n., *ante*, p. *56*). The plaintiff must give notice to plead to it; and the time for pleading to it is eight days, as in the case of a declaration (ss. *62*, *63*, *ante*, p. *65*). A new assignment and a replication may be pleaded together to the same plea without leave.

88. No plea, which has already been pleaded to the declaration, shall be pleaded to such new assignment, except a plea in denial, unless by leave of the court or a judge; and such leave shall only be granted upon satisfactory proof that the repetition of such plea is essential to a trial on the merits.

Pleas not to be repeated.

This enactment somewhat limits the general rights conferred by ss. 81, 84 (*ante*, pp. 80, 82).

89. The form of a demurrer, except in the cases herein specifically provided for, shall be as follows, or to the like effect:—

Form of demurrer and joinder in demurrer.

"The defendant, by his attorney [*or* in person, *&c.* *or* plaintiff], says, that the declaration [*or* plea, *&c.*] is bad in substance;"

and in the margin thereof some substantial matter of law intended to be argued shall be stated; and if any demurrer shall be delivered without such statement, or with a frivolous statement, it may be set aside by the court or a judge, and leave may be given to sign judgment as for want of a plea; and the form of a joinder in demurrer shall be as follows, or to the like effect:—

"The plaintiff [*or* defendant] says that the declaration [*or* plea, *&c.*] is good in substance."

As there are no cases herein specifically provided for, the exception of these cases may be rejected as surplusage in this enactment; and it may also be observed, that the word *plea* does not mean a plea technically so called (*i. e.*, the answer to the declaration), but a pleading generally, as a replication, rejoinder, &c. (*Cutts* v. *Surridge*, 9 Q. B. 1015).

See generally sections 50, 51 (*ante*, p. 52); and R. G., H. T. 1853, rr. 14, 15, 16, 17, *post*.

A demurrer is a pleading within s. 54 (*ante* p. 56, and must be properly entitled and dated as therein directed; and be delivered between the parties.

Marginal note in demurrers. The statement in the margin should not be a mere repetition of the demurrer; but should state some special ground (*Ross* v. *Robeson*, 3 Dowl. 779). Several special grounds may be stated (*Whitmore* v. *Nicholls*, 3 Dowl. 521); but the party demurring is not restricted upon the argument to the grounds so stated; the object of this statement being rather to give colour to the demurrer.

The want of the statement in the margin is no ground for objecting to the demurrer being argued: it only affords ground for setting it aside (*Lacy* v. *Umbers*, 3 Dowl. 732). Stating what is frivolous is stating nothing (*Per* Parke, B., *Tucker* v. *Barnsley*, 16 M. & W. 54).

May be amended. A defective marginal note will be allowed to be amended on payment of costs (*Ross* v. *Robeson*, 3 Dowl. 779), and the case postponed to allow points for argument to be stated (*Parker* v. *Riley*, 3 M. & W. 230).

Frivolous demurrers may be set aside. The application to the court to set aside a demurrer as frivolous must be made on an affidavit referring to the pleadings and setting them out (*Daniell* v. *Lewis*, 1 Dowl. N. S. 542). The application must be made promptly, as advantage cannot be taken after a joinder in demurrer, and notice of trial of issues in fact (*Norton* v. *Mackintosh*, 7 Dowl. 529). A frivolous demurrer is not an irregularity, waived by applying for further time to reply to it (*Cutts* v. *Surridge*, *ubi supra*).

Joinder in demurrer. The party demurring should give a notice to join in demurrer to enable him, if a joinder is not delivered within four days, to sign judgment (R. G., H. T. 1853, r. 14, *post*).

The party whose pleading is demurred to may amend, on obtaining leave to do so from the court, or a judge at chambers. This is generally only allowed on payment of the costs of the demurrer; but the judge at chambers may give nominal costs, and the court will not review his decision (*Tomlinson* v. *Bollard*, 4 Q. B. 642).

As to the time for the other party's pleading after amendment, see s. 90 (*post*, p. 85).

If he does not amend, he must join in demurrer in four days; but he may obtain further time, if necessary. The joinder should be entitled and dated, as directed by s. 54 (*ante*, p. 56).

Demurrer books. The issue or demurrer book must be made up and duly delivered by the suitor, his attorney or agent, as the case may be (R. G., H. T. 1853, rr. 16, 17, *post*; and see *Jewell* v. *Parr*, 16 C. B. 684).

Setting down for argument. If the books are not delivered to all the judges, the cause may

be struck out of the paper (*Abraham* v. *Cook*, 3 Dowl. 215). If one party make default and the other deliver all his books, the party in default cannot be heard until he has paid his opponent's costs of such additional delivery, and is subject to judgment (*Wilton* v. *Scarlett*, 1 D. & L. 810; and see *Sandall* v. *Bennett*, 2 A. & E. 204; *Sanghurst* v. *Haynes*, 13 W. R. 291, Q. B., M. T. 1865).

To obtain the costs from the defaulting party, the other party should deliver the books the day after the default (*Fisher* v. *Snow*, 3 Dowl. 27).

Demurrers [as well as special cases and special verdicts and appeals from county courts] shall be set down for argument at the request of either party, and notice thereof shall be forthwith given by such party to the opposite party (R. G., H. T. 1853, r. 15, *post*). The notice must be given four clear days before the day fixed for the actual argument (r. 15; and see *Jewell* v. *Parr*, 16 C. B. 684). It is irregular to deliver a joinder in demurrer, and at the same time a notice that it has been set down for argument (*Gibbons* v. *Mottram*, 1 D. & L. 815).

Upon cross demurrers the plaintiff is, in the Queen's Bench and Common Pleas, entitled to begin (*Halhead* v. *Young*, 6 E. & B. 312; L. J. 25, Q. B. 290; *Wolverhampton Waterworks* v. *Hawkesford*, L. J. 28, C. P. 242; *Churchward* v. *The Queen*, L. R. 1, Q. B. 173); in the Exchequer, however, the party first demurring is entitled to begin (*Hill* v. *Cawdery*, 1 H. & N. 360; L. J. 25, Ex. 285; *Redway* v. *Sweeting*, 2 Weekly Notes, 1867, p. 185, Ex. T. T).

It is not usual to allow a party to amend after judgment on demurrer has been given against him; but before judgment, though after an expression of the opinion of the court, leave is given to amend, almost as of course, upon payment of costs. But see *Wilson* v. *Tucker* (2 Dowl. 83).

See, as to delivering notice of executing a writ of inquiry with a demurrer or joinder in demurrer, R. G., H. T. 1853, r. 40, *post*; and s. 97 (*post*, p. 89).

90. Where an amendment of any pleading is allowed, no new notice to plead thereto shall be necessary; but the opposite party shall be bound to plead to the amended pleading within the time specified in the original notice to plead, or within two days after amendment, whichever shall last expire, unless otherwise ordered by the court or a judge; and in case the amended pleading has been pleaded to before amendment, and is not pleaded to *de novo* within two days after amendment, or within such other time as the court or a judge shall allow, the pleadings originally pleaded thereto shall stand and be considered as pleaded in answer to such amended pleading. Time for pleading after amendment.

See note to s. 34 (*ante*, pp. 38 *et seq.*)

See also notes to s. 63 (*ante*, pp. 65 *et seq.*), as to the time allowed for pleading.

Examples of Pleading.

And whereas it is desirable that examples should be given of the statements of causes of action, and of forms of pleading: be it enacted as follows:—

Forms in schedule may be adopted.

91. The forms contained in the schedule (B.) to this act annexed shall be sufficient, and those and the like forms may be used, with such modifications as may be necessary to meet the facts of the case; but nothing herein contained shall render it erroneous or irregular to depart from the letter of such forms, so long as the substance is expressed without prolixity.

See as to the construction of this section, *Place* v. *Potts* (8 Exch. 705); *Wilkinson* v. *Sharland* (10 Exch. 724; 11 Exch. 33); and *Fagg* v. *Nudd* (3 E. & B. 650). See also *Fenton* v. *Ellis* (6 Taunt. 192); *Brown* v. *Garnier* (6 Taunt. 389); *Victors* v. *Davies* (12 M. & W. 758); *Kelly* v. *Curson* (4 A. & E. 622); *Berdoe* v. *Spittle* (1 Exch. 175).

Particulars of the common plea of fraud and covin may be ordered (*M'Creight* v. *Stevens*, 1 H. & C. 454; and see *Marshall* v. *Emperor Life Assurance Company*, L. R., 1 Q. B. 35); and, although such an order was formerly very unusual it is now very frequently made.

Judgment by Default.

And with respect to judgment by default, and the mode of ascertaining the amount to be recovered thereupon, be it enacted as follows:—

Rule to compute abolished.

92. No rule to compute shall be necessary or used: but nothing in this act contained shall invalidate any proceedings already taken or to be taken by reason of any rule to compute made, or applied for, before the commencement of this act.

Judgment by default for liquidated demands final.

93. In actions where the plaintiff seeks to recover a debt or liquidated demand in money, judgment by default shall be final.

Judgment by default may be signed on non-appearance of the defendant, when the writ is specially endorsed (s. 27, *ante*, p. 32); and after declaration, for want of a plea, when the writ has not been so endorsed (s. 28, *ante*, p. 34). The term judgment *by default* includes judgment by *nil dicit*, as after appearance, for want of a plea, rejoinder, &c. (ss. 53, 63, *ante*, pp. 55, 65).

As to what constitutes a "debt or liquidated demand in money," see s. 25 (*ante*, p. 31), and s. 94 (*post*, p. 87): these words are used here in contradistinction to *damages*.

This section does not apply to actions of debt within the 8 & 9 Will. 3, c. 11 (see s. 96, *post*, p. 88).

As to setting aside a judgment on an affidavit of merits, see s. 27, n. (*ante*, p. 33).

In other cases than those above referred to, interlocutory judgment only may be signed; and the amount for which final judg-

ment is to be signed must, in such other cases, be ascertained under the following section.

Inquiry of damages may be directed to take place before the master.

94. In actions in which it shall appear to the court or a judge that the amount of damages sought to be recovered by the plaintiff is substantially a matter of calculation, it shall not be necessary to issue a writ of inquiry, but the court or a judge may direct that the amount for which final judgment is to be signed shall be ascertained by one of the masters of the said court; and the attendance of witnesses and the production of documents before such master may be compelled by subpœna, in the same manner as before a jury upon a writ of inquiry; and it shall be lawful for such master to adjourn the inquiry from time to time, as occasion may require; and the master shall endorse upon the rule or order for referring the amount of damages to him the amount found by him, and shall deliver the rule or order with such indorsement to the plaintiff; and such and the like proceedings may thereupon be had as to taxation of costs, signing judgment, and otherwise, as upon the finding of a jury upon a writ of inquiry.

It was formerly the practice to refer to the Master the computation of the amount for which final judgment was to be signed in actions on bills of exchange, promissory notes and cheques; in actions on awards, in actions of covenant for rent, or for mortgage money, or for the arrears of an annuity. The cases are collected in *Holdipp* v. *Otway*, (2 Wms. Saund. 107, n. 2).

In these actions, and in actions of a like nature, the writ may now, when the defendant is within the jurisdiction, be specially endorsed, under s. 25 (*ante*, p. 31); upon which no inquiry is needed.

If the defendant resides out of the jurisdiction, there must always be an inquiry (ss. 18, 19, *ante*, pp. 16, 27).

In what cases a reference will be made.

Under the old practice, a reference to the Master was not ordered where the action was for an uncertain sum, and not a mere matter of figures; as on a foreign judgment (*Messin* v. *Lord Massareene*, 4 T. R. 493); on a bill of exchange for foreign money (*Maunsell* v. *Massareene* 4 T. R. 87); or on a bottomry-bond (*Palin* v. *Nicholson*, Tidd, 589); on a covenant to indemnify, where it was open to the jury to inquire into questions of collateral satisfaction of the plaintiff's claims (*Denison* v. *Mair*, 14 East, 622); in an action on a judgment, interest being claimed as damages, when the jury (before the 1 & 2 Vict. c. 110, s. 17) were left to consider whether any and what damages should be given (*Nelson* v. *Sheridan*, 8 T. R. 395); and in an action for railway calls, where the reference to the Master was refused, and the case left to the jury by Williams, J., on the ground that the matter was too involved and intricate (*Cheltenham Railway Company* v. *Fry*, 7 Dowl. 616).

In an action on a foreign judgment, or on a foreign bill of

exchange, the damages are now held to be "substantially a matter of calculation." And if the defendant is within the jurisdiction, the writ may in such cases be specially endorsed under s. 25 (*ante*, p. 31). In an action on a covenant, the propriety of an inquiry may depend on the nature of the covenant. The damages in an action for railway calls would seem to be substantially a matter of calculation; and the reason assigned in the report of the case above referred to, for leaving the inquiry to a jury instead of to the Master, is not very satisfactory.

The court or a judge may direct that the amount for which final judgment is to be signed should be ascertained by one of the Masters. This proceeding is in lieu (in the cases above referred to) of the writ of inquiry, which was issued after interlocutory judgment had been signed, to ascertain the amount of damages to be awarded to the plaintiff. This judgment must still be signed in cases not within ss. 25, 93 (*ante*, pp. 31, 86). A writ of inquiry was granted where the plaintiff died after interlocutory judgment (*Berger* v. *Green*, 1 M. & S. 229).

Though there are several defendants, and several interlocutory judgments, there must be but one reference (*Field* v. *Pooley*, 3 M. & G. 756). A reference to the Master may be applied for on the same day that judgment is signed (*Russen* v. *Hayward*, 5 B. & A. 752).

Though the "rule to compute" is expressly abolished by s. 92 (*ante*, p. 86), proceedings somewhat similar to those used in obtaining that rule are necessary to get an order under this section. The order is obtained upon summons, supported by an affidavit of the cause of action, and that interlocutory judgment has been signed.

The order, and notice of the appointment made under it by the Master, must be served and proceeded upon in the usual course. See R. G., H. T. 1853, r. 171, *post*.

Judgment for money demands without distinction between debt and damages.

95. In all actions where the plaintiff recovers a sum of money, the amount to which he is entitled may be awarded to him by the judgment generally, without any distinction being therein made as to whether such sum is recovered by way of a debt or damages.

Saving as to certain provisions of 8 & 9 Will. 3, c. 11.

96. Nothing in this act contained shall in any way affect the provisions of a certain act of parliament passed in the session of parliament holden in the eighth and ninth years of the reign of his majesty King William the Third, intituled "An Act for the better preventing frivolous and vexatious Suits," as to the assignment or suggestion of breaches, or as to judgment for a penalty as a security for damages in respect of further breaches.

Roberts v. *Mariett* (2 Wms. Saund. 187, *et seq*).

So it was held that money could not be paid into court in an action on a bond within the 8 & 9 Will. 3, c. 11, which see *ante*, p. 71, n. (*Bishop of London* v. *McNiel*, 9 Exch. 490). As to common money bonds, see C. L. P. A. 1860, s. 25, *post*.

NOTICE OF TRIAL, INQUIRY AND COUNTERMAND.

And with respect to notice of trial and inquiry, and countermand thereof, be it enacted as follows:—

Time for notice of trial and inquiry.

97. Ten days' notice of trial or inquiry shall be given, and shall be sufficient in all cases, whether at bar or nisi prius, in town or country, unless otherwise ordered by the court or a judge.

Notice of trial must be given in every case; except (1), where a cause has been made a *remanet* from one sitting to another, in London and Middlesex (*Ham* v. *Greg*, 6 B. & C. 125; *Claudet* v. *Prince*, L. R. 2, Q. B. 406) [it is necessary where a cause has been made a *remanet* at the assizes (*Gains* v. *Bilson*, 4 Bing. 414), and see *Cawley* v. *Knowles* (16 C. B., N. S. 107)]; (2), where a cause has been put off by an order of Nisi Prius (*Shepherd* v. *Butler*, 1 D. & R. 15); (3), where it has been delayed by an injunction, rule of Court or judge's order after notice of trial (*Stockton and Darlington Railway Company* v. *Fox*, 6 Exch. 127; *Claudet* v. *Prince*, *ubi supra*, overruling *Jacks* v. *Meyer*, 8 T. R. 245, and *Ellis* v. *Trusler*, 2 W. Black. 798, and distinguishing *Cawley* v. *Knowles*, *ubi supra*).

Notice of trial or inquiry, and of continuance of trial or inquiry, shall be given in town (R. G., H. T. 1853, r. 34, *post*).

See as to notice to produce record upon issue *nul tiel record*, R. G., H. T. 1853, r. 38, *post*.

See as to delivering notice of executing a writ of inquiry with a demurrer or joinder in demurrer, R. G., H. T. 1853, r. 40 (*post*). Such proceeding would seem to be applicable also in cases where notice of trial of issues in fact is given as well; but, although a defendant is under terms to take short notice of trial, he is still entitled to full notice of inquiry.

Where no notice of trial has been given, a defendant is not entitled to his costs of preparing for trial (*Cooper* v. *Boles*, 5 H. & N. 188; L. J. 29, Ex. 141; *Curtis* v. *Platt*, L. J. 33, C. P. 255); nor in such a case is a plaintiff so entitled (*Freeman* v. *Springham*, 14 C. B., N. S. 197; L. J. 32, C. P. 249).

The notice is now to be in all cases a ten days' notice, but taking "short notice of trial" may be made a condition of obtaining time to plead or leave to amend. Sometimes the words "if necessary" are introduced into the order; as to their application, see *Flowers* v. *Welch* (9 Ex. 272; L. J. 23, Ex. 7). Short notice, in all cases, and whether of trial or of inquiry, is four days (R. G., H. T. 1853, r. 35, *post*).

Form of notice.

The notice must be in writing (R. G., H. T. 1853, r. 161, *post*). No particular form of words is necessary to constitute a good notice, provided it clearly informs the party in sufficient time when and where the cause is to be tried (*Cory* v. *Hotson*, 1 L., M. & P. 23). The notice is usually given on the back of the issue; and, if so, need not be entitled in the court or cause; but if on separate paper, it must be so entitled. A notice of trial originally dated the 2nd of April, 1856, was given for the first sittings "in next Easter Term." It was afterwards altered by dating it as of the 15th of April, and making it a notice for the second sittings "in next Easter Term." This was held a good notice for Easter

Term, 1856 (*Fenn* v. *Green*, 6 E. & B. 656; L. J. 25, Q. B. 353; overruling *Benthall* v. *West*, 1 D. & L. 599).

If the notice is endorsed on the issue, and a separate notice given for a different day, the notice will be irregular (*Kerry* v. *Reynolds*, 4 Dowl. 234). The notice should be withdrawn, and fresh notice given (*Fell* v. *Tyne*, 5 Dowl. 246).

A notice of continuance, bad as such, may be a good notice of trial, if given in sufficient time (*Cory* v. *Hotson*, *ubi supra*).

To whom to be given.

It must be served on the attorney in the cause, or on the defendant, if he has appeared in person; in which latter case, it must, formerly, have been served personally upon him, or appear to have come to his knowledge (*Fry* v. *Mann*, 1 Dowl. 419; but see R. G., H. T. 1853, r. 166, *post*). It would appear that the notice may not be left at the address given in the appearance, for pleadings and other proceedings requiring *personal* service are excepted from those which may be so left (see s. 30, *ante*, p. 35, and R. G., H. T. 165—167, *post*).

A trial will not be irregular if the attorney who has received notice dies after such notice, provided the plaintiff does not know the fact (*Ashley* v. *Brown*, 1 L., M. & P. 451).

Notice of continuance in town causes.

If the plaintiff is not ready to proceed, he may, in town causes, instead of countermanding, continue his notice of trial (see R. G., H. T. 1853, r. 36, *post*). Notice of continuance must be given four days, or, after short notice, two days before the day of trial or inquiry, the same notice as in the case of a countermand (*Forbes* v. *Crow*, 1 M. & W. 465). A notice of continuance may be given on a writ of inquiry (*Wilson* v. *Nesbitt*, 1 Dowl. N. S. 675), and possibly also on a reference to the Master, under s. 94 (*ante*, p. 87). It cannot be given after a countermand (*Smith* v. *Hoff*, Barnes, 301).

As to the defendant's proceedings, if plaintiff fails to try, see s. 101 (*post*, p. 92).

Irregular notice.

If the notice of trial is irregular or insufficient, the verdict, if the plaintiff goes to trial, and the defendant does not appear, may be set aside by the defendant (*Williams* v. *Williams*, 2 Dowl. 350; *Benthall* v. *West*, *ubi supra*). But an irregularity in, or want of notice, may be waived; as by appearing at the trial (*Doe* d. *Antrobus* v. *Jepson*, 3 B. & Ad. 402); or by the defendant taking proceedings to get the cause struck out of the list (*Young* v. *Fisher*, 2 Dowl. N. S. 637); or by the defendant obtaining a rule for a special jury (*Berresford* v. *Geddes*, L. R., 2 C. P. 285).

Where no proceedings have been taken for one year, a month's notice is necessary (see R. G., H. T. 1853, r. 176, *post*, and s. 58, *ante*, p. 59).

See R. G., H. T. 1853, rr. 34—41, 174, 175, *post*.

Notice of countermand.

98. A countermand of notice of trial shall be given four days before the time mentioned in the notice of trial, unless short notice of trial has been given, and then two days before the time mentioned in the notice of trial, unless otherwise ordered by the court or a judge, or by consent.

The notice of countermand must be in writing.

"Countermand of notice of trial or inquiry may be given either in town or country, unless otherwise ordered by the court or a judge" (R. G., H. T. 1853, r. 34, *post*); *i. e.* it may be given either to the attorney in town, or agent in the country (although the agent's name appears on the record), and by either (*Chestyn* v. *Pearce*, 4 Dowl. 693). But a notice to a defendant in the country, who appears by attorney in town, is insufficient (*Margetson* v. *Rush*, 8 Dowl. 388).

A *remanet* cannot in general be the subject of a countermand (*Tempany* v. *Rigby*, 10 Exch. 476); but where a town cause was made a remanet from the first to the third sittings on the application of the defendant, it was held that the plaintiff was in the same position as if the notice of trial had been for the third sittings, and, consequently, a notice of countermand given more than four days before the third sittings was good (*Sully* v. *Noble*, 1 H. & C. 809; L. J. 32, Ex. 145).

As to the defendant's proceedings if the plaintiff fails to try the cause, see s. 101 (*post*, p. 92).

Although it may be too late to give a proper notice of countermand, a notice may usefully be given with a view of preventing the defendant from incurring thereafter unnecessary costs.

See s. 97 and note (*ante*, p. 89); and R. G., H. T. 1853, rr. 34—41, *post*.

Costs of the day.

99. A rule for costs of the day for not proceeding to trial pursuant to notice, or not countermanding in sufficient time, may be drawn up on affidavit, without motion.

It is a side bar rule, R. G., H. T. 1853, r. 39, *post*. As to affidavit, see *Powell* v. *James* (12 M. & W. 100).

"Costs of the day" are the same as those which are paid on a withdrawal of the record (*Walker* v. *Lane*, 3 Dowl. 504); and if the cause has been made a *remanet* from one sittings to another, the "costs" are the "costs of the day" of the second sittings when the default took place (*Brett* v. *Stone*, 1 D. & L. 140).

Payment of the costs.

Payment of the costs may be enforced by execution upon the Master's *allocatur*, under 1 & 2 Vict. c. 110, s. 18 (*Hodgson* v. *Paterson*, 2 Dowl. N. S. 129).

Excuse for not going to trial.

The rule is, of course; so that if the plaintiff had any good excuse for not having gone to trial, he must move the court to discharge the rule. A proposal to refer, made after the commission day, will be no excuse (*Eaton* v. *Shuckburgh*, 2 Dowl. 624). In one case (*Mullins* v. ———, 5 Taunt. 88), he was considered justified in withdrawing the record, on the ground that the jury was prejudiced. In another case, an accident to a material witness was held a sufficient excuse for not trying (*Ogle* v *Moffatt*, Barnes, 133); and the necessary absence of a material witness has been held a good excuse for not going to trial (*Eastern Union Railway Company* v. *Symonds*, 4 Exch. 502). In another case, the plaintiff withdrew the record on account of the absence of a witness, on being told that the cause might be re-entered for trial before twelve o'clock. The defendant then entered a *ne recipiatur*, and on the witness appearing, the plaintiff offered to try, but the defendant refused to consent. The court refused the defendant the costs of the day (*Pope* v. *Fleming*, 5 Exch. 249); *sed quære* whether a rule under this section will be discharged; and *quære* whether the bankruptcy or insolvency of the plaintiff

will be considered an excuse for not trying, as it was formerly a reason for discharging a rule for judgment as in a case of a nonsuit, or entering a *stet processus*.

A defendant is not entitled to costs of the day when the cause was struck out owing to the absence of *both* parties (*Morgan* v. *Fernyhough*, 11 Ex. 205; L. J. 25, Ex. 52); nor where the jury have not been sworn (*Warne* v. *Hill*, 7 C. B., N. S. 726; L. J. 29, C. P. 201); nor where the defendant has not applied for a nonsuit (*Leech* v. *Gibson*, 10 W. R. 354, Ex. H. T. 1862; *Smith* v. *Marshall*, L. J. 33, Q. B. 322; see also *Greenaway* v. *Holmes*, 2 C. L. R. 745; C. P., E T. 1854). All objections to the allowance of these costs should be taken before the master upon the taxation, and not reserved *sub silentio* for a subsequent application to the court (*Rainforth* v. *Hamer*, 3 C. L. R. 298; Q. B., H. T. 1855).

Formerly the payment of the costs of the day would not be made a condition precedent to further proceedings, unless in peculiar circumstances; as where the plaintiff was a pauper, and resident out of the jurisdiction (*Cross* v. *Port of London Insurance Company*, 6 D. & L. 250; L. J. 18, Q. B. 2). See now R. G., H. T. 1853, r. 122, *post*.

Judgment for not proceeding to Trial.

And with respect to judgment for default in not proceeding to trial, be it enacted as follows:—

Statute 14 Geo. 2, c. 17, as to judgment in case of nonsuit, repealed.

100. The act passed in the fourteenth year of the reign of his Majesty King George the Second, intituled "An Act to prevent inconveniences arising from Delays of Causes after Issue joined," so far as the same relates to judgment as in the case of a nonsuit, shall be and the same is hereby repealed, except as to proceedings taken or commenced thereupon before the commencement of this act.

Proceeding where plaintiff neglects to bring on the cause to be tried.

101*. Where any issue is or shall be joined in any cause, and the plaintiff has neglected or shall neglect to bring such issue on to be tried, that is to say, in town causes where issue has been or shall be joined in, or in the vacation before, any term, for instance, Hilary Term, and the plaintiff has neglected or shall neglect to bring the issue on to be tried during or before the following term and vacation, for instance, Easter Term and Vacation, and in country causes where issue has been or shall be joined in, or in the vacation before, Hilary or Trinity Term, and the plaintiff has neglected or shall neglect to bring the issue on to be tried at or before the second assizes following such term, or if issue has been or shall be

* This section would seem not to be applicable in ejectment, where there is, strictly speaking, no issue joined, and for which special provision is made by s. 202, *post*; and see *Scope* v. *Paddison* (6 H. & N. 641; L. J. 30, Ex. 244), cited in note to section 177, *post*.

joined in, or in the vacation before, Easter or Michaelmas Term, then, if the plaintiff has neglected or shall neglect to bring the issue on to be tried at or before the first assizes after such term, whether the plaintiff shall in the meantime have given notice of trial or not, the defendant may give twenty days' notice to the plaintiff to bring the issue on to be tried at the sittings or assizes, as the case may be, next after the expiration of the notice; and if the plaintiff afterwards neglects to give notice of trial for such sittings or assizes, or to proceed to trial in pursuance of the said notice given by the defendant, the defendant may suggest on the record that the plaintiff has failed to proceed to trial, although duly required so to do, (which suggestion shall not be traversable, but only be subject to be set aside if untrue,) and may sign judgment for his costs; provided that the court or a judge shall have power to extend the time for proceeding to trial, with or without terms.

It may be difficult to apply this section, when the venue has been changed after issue joined.

If the plaintiff fails to bring on the cause for trial, the defendant may, under this section, after giving the notice therein provided for, suggest the plaintiff's neglect to try, and sign judgment for his costs. He may, however, if he prefer it, take down the cause for trial by proviso (a. 116, *post*, p. 100).

The plaintiff may apply for an extension of the time after notice, but before the suggestion is entered by the defendant; and this is the better course (*Farthing* v. *Castles*, L. J. 22, Q. B. 167, Bail Court). The application must be made within the twenty days (*per* Martin, B., in *Horner* v. *Spencer*, 1 F. & F. 412). The twenty days may include the ten days which the plaintiff would require for his notice of trial (*Judkins* v. *Atherton*, 3 E. & B. 987; L. J. 23, Q. B. 335).

When to give notice.

Issue must be joined, but need not be delivered (*Heath* v. *Borall*, 7 Dowl. 16). Issue must be joined as to all the defendants who plead, if there be several (*Jackson* v. *Utting*, 2 Dowl. N. S. 543); at least, as to those who are alive; for if one or more of several defendants die, their deaths must be suggested (*Pinkus* v. *Sturch*, 5 C. B. 474).

When the plaintiff must proceed.

The time from which the plaintiff's delay will commence running will not begin till the last issue is joined, if there are several (*Crowther* v. *Duke*, 7 Scott, 409). If there are issues in law, the plaintiff is not bound to go to trial until these issues are determined (*Crisp* v. *Attwell*, 1 L. M. & P. 454), unless otherwise ordered under s. 80 (*ante*, p. 79). If the plaintiff's proceedings have been stayed by an injunction, he is bound to go on as soon as the injunction is dissolved (*Dobson* v. *Brocklebank*, 7 Ex. 316; L. J. 21, Ex. 96). This section applies where plaintiff has proceedings pending at law and in equity, and elects to proceed in equity (*Mortimore* v. *Soares*, 1 E. & E. 399; L. J. 28, Q. B. 133).

It would seem that in a town cause the defendant may give the

twenty days' notice under this section immediately the vacation sittings are over, and need not wait till the first day of the following term.

In what cases notice excluded.

If a plaintiff had once taken the cause down to trial, although a new trial was afterwards granted, and fresh notice given, pursuant to which the plaintiff did not proceed, a rule for judgment as in case of a nonsuit would not, under the old practice, have been granted (*Hawley* v. *Shirley*, 5 Dowl. 393). The defendant might try by proviso. So where the plaintiff was nonsuited, and the nonsuit afterwards set aside, a rule was refused (*Ashley* v. *Flaxman*, 2 Dowl. 697). So where, in country causes, the cause had been made a *remanet* (*Brown* v. *Rudd*, 1 Dowl. 371); and where the plaintiff had given fresh notice of trial (*Gilbert* v. *Kirkland*, 2 Dowl. 153), a rule was refused. It was different in *town* causes; for there the record was not re-entered, nor was fresh notice of trial given; but the cause came on as if the sittings had been continued without interruption (*Lawes* v. *Bolt*, 16 M. & W. 362). The proceeding to be adopted by the defendant under this section would seem to be available to him, as was that for judgment as in the case of a nonsuit, only on the first failure of the plaintiff to try the cause.

Death of a party.

The suggestion to be entered by the defendant under this section cannot be entered while the record is imperfect, as if a plaintiff has died since default made in going to trial. In such case a suggestion of the death must be first entered (*Larkin* v. *Buckle*, 1 L. M. & P. 740). So if any of several defendants have died since the writ issued, the record must show the issue had been completely joined at the time of the plaintiff's default (*Pinkus* v. *Sturch*, 5 C. B. 474).

Neglect of plaintiff.

Where a plaintiff has proceeded at law and in equity, and has elected to proceed in equity after issue joined in the action, the defendant may, under this section, give notice to the plaintiff to bring the issue on to be tried; and if the plaintiff neglects to do so, the defendant may enter a suggestion on the record and sign judgment for his costs (*Mortimore* v. *Soares*, 1 E. & E. 399).

Where the defendant had applied at chambers to put off the trial, and the hearing had been postponed, so that the commission day was close at hand, it was considered that the plaintiff was justified in countermanding; and that there was no neglect on his part (*Rendell* v. *Bailey*, 2 Dowl. 113). So if the plaintiff countermands his notice of trial, or does not proceed to trial, at defendant's request, there is no neglect on his part (*Jenkins* v. *Charity*, 2 Dowl. 197: *Doe* d. *Steppins* v. *Lord*, 2 Dowl. 419). So there is no neglect of the plaintiff if the defendant in any way consents to the delay (*Grey* v. *Hutchings*, 3 Dowl. 414), as by negotiating for a settlement (*Alford* v. *Fellows*, 9 Dowl. 326).

Bankruptcy, &c. of plaintiff.

As to the mode of proceeding if the plaintiff becomes bankrupt or insolvent, see s. 142, *post*.

Bankruptcy, &c. of defendant.

See *Truscott* v. *Latour* (9 Exch. 420).

Actions against prisoners.

See R. G., H. T. 1853, r. 124, *post*.

Writs of trial.

See R. G., H. T. 1853, r. 58, *post*.

NISI PRIUS RECORD.

And with respect to the nisi prius record, be it enacted as follows:—

Nisi Prius record not to be sealed or passed.

102. The record of nisi prius shall not be sealed or passed, but may be delivered to the proper officer of the court in which the cause is to be tried, to be by him entered as at present, and remain until disposed of.

See as to annexing to record the particulars of demand and set-off, R. G., H. T. 1853, r. 19; and as to entering causes in London and Middlesex, r. 43, *post*.

Trials in counties palatine.

103. Records of the superior courts of common law shall be brought to trial and entered and disposed of in the counties palatine in the same manner as in other counties.

No *mittimus* to the Chancellor of the Counties Palatine will henceforth be requisite.

JURY AND JURY PROCESS.

And with respect to juries and jury process, be it enacted as follows:—

Jury process abolished.

104. The several writs of *venire facias juratores*, and *distringas juratores*, or *habeas corpora juratorum*, and the entry *juratur ponitur in respectu*, shall no longer be necessary or used.

Precept by judges of assize to common jurors for civil as well as criminal trials.

105. The precept issued by the judges of assize to the sheriff to summon jurors for the assizes shall direct that the jurors be summoned for the trial of all issues, whether civil or criminal, which may come on for trial at the assizes; and the jurors shall thereupon be summoned in like manner as at present.

This section perhaps does not provide for summoning juries in cases where the sheriff is a party. The *venire* was formerly in such a case directed to the coroner, which was permitted by the use of the words *sheriff or other minister* in the Jury Act (6 Geo. 4, c. 50); but any such difficulty is removed by the C. L. P. A. 1854, s. 59, *post*.

A printed panel to be prepared and annexed to the record.

106. A printed panel of the jurors summoned shall, seven days before the commission day, be made by the sheriff, and kept in the office for inspection; and a printed copy of such panel shall be delivered by the sheriff to any party requiring the same, on payment of one shilling; and such copy shall be annexed to the nisi prius record.

See R. G., H. T. 1853, r. 47, *post*.

Sheriffs of London and Middlesex to summon common jurors and prepare a panel to be annexed to the record.

107. The sheriffs of London and Middlesex respectively shall, pursuant to a precept under the hand of a judge of any of the said superior courts, and without any other authority, summon a sufficient number of common jurors for the trial of all issues in the superior courts of common law, in like manner as before this act; and seven days before the first day of each sittings a printed panel of the jurors so summoned for the trial of causes at such sittings shall be made by such sheriffs, and kept in their offices for public inspection; and a printed copy of such panel shall be delivered by the said sheriffs to any party requiring the same on payment of one shilling; and such copy shall be annexed to the nisi prius record; the said precept shall and may be in like form as the precept issued by the judges of assize, and one thereof shall suffice for each term and for all the superior courts; and it shall be the duty of the sheriffs respectively to apply for and procure such precept to be issued in sufficient time before each term to enable them to summon the jurors in manner aforesaid; and it shall be lawful for the several courts, or any judge thereof, at any time to issue such precept or precepts to summon jurors for disposing of the business pending in such courts, and to direct the time and place for which such jurors shall be summoned, and all such other matters as to such judge shall seem requisite.

Special jurors, not exceeding forty-eight in number, to be summoned to try all special jury cases at assizes.

108. The precept issued by the judges of assize as aforesaid shall direct the sheriff to summon a sufficient number of special jurymen, to be mentioned therein, not exceeding forty-eight in all, to try the special jury causes at the assizes; and the persons summoned in pursuance of such precept shall be the jury for trying the special jury causes at the assizes, subject to such right of challenge as the parties are now by law entitled to; and a printed panel of the special jurors so summoned shall be made, kept, delivered and annexed to the nisi prius record, in like time and manner and upon the same terms as hereinbefore provided with reference to the panel of common jurors; and upon the trial the special jury shall be balloted for, and called in the order in which they shall be drawn from the box, in the same manner as common jurors; provided that the court or a judge, in such case as they or he may think fit, may order that a special jury be struck according to the present practice, and such order shall be a sufficient warrant for striking such

special jury, and making a panel thereof for the trial of the particular cause.

There is no right of peremptory challenge of special jurors summoned under this section (*Creed* v. *Fisher*, 9 Exch. 472).

The sheriff is not entitled to fees directed by the judges under the 7 Will. 4 & 1 Vict. c. 55 (*Bennett* v. *Thompson*, 6 E. & B. 683).

Mode of obtaining a special jury in country causes.

109. In any county, except London and Middlesex, the plaintiff in any action, except replevin, shall be entitled to have the cause tried by a special jury, upon giving notice in writing to the defendant, at such time as would be necessary for a notice of trial, of his intention that the cause shall be so tried; and the defendant or plaintiff in replevin shall be so entitled, on giving the like notice within the time now limited for obtaining a rule for a special jury: Provided that the court or a judge may at any time order that a cause shall be tried by a special jury, upon such terms as they or he shall think fit.

Notice to parties.

Out of London and Middlesex, therefore, a plaintiff in any action, except replevin, must ordinarily give a ten days' notice, unless the defendant is under terms to take short notice of trial, when a similarly short notice of trial by special jury may be given. A defendant must ordinarily give his notice more than six days before the commission day, but not until after issue joined (R. G., H. T. 1853, r. 44, *post*; *Draper* v. *Norwood*, 5 Jur., N. S. 1083; C. P., E. T. 1859; and *Dresser* v. *Norman*, 6 C. B., N. S. 427).

Notice to sheriff.

In order to insure a special jury being summoned, notice must be given to the sheriff six days before the commission day that the cause is to be tried by a special jury, otherwise the cause may be tried by a common jury, unless the court or a judge otherwise orders (s. 112, *post*, p. 99).

Certificate for costs of special jury.

The party who gives a notice to try the cause by a special jury has to pay all the expenses of it; and these expenses are not allowed as costs between the parties, unless the judge certifies on the back of the record that the cause was a proper one to be tried by a special jury (6 Geo. 4, c. 50, s. 34). The judge must certify immediately after a verdict, *i. e.*, within a reasonable time after it is pronounced (*Christie* v. *Richardson*, 2 Dowl. N. S. 503). Where the judge's signature to a certificate, which he in court intimated his intention of giving, was not procured for some weeks after the trial, it was held that he had not certified in time (*Grace* v. *Church*, 3 G. & D. 591; see also *Leech* v. *Lamb*, 11 Exch. 487; also *Serrell* v. *Derbyshire Railway Company*, 10 C. B. 910; and *per* Cresswell, J., *Skipper* v. *Bodkin*, L. J. 29, P. M. & A. 133; better 8 W. R. 589).

The costs of a special jury, if the judge certifies, necessarily depend upon the disposal of the general costs of the cause; see *Waters* v. *Howells* (8 Exch. 244; S. C. sub nom. *Walter* v. *Howell*, L. J. 22, Ex. 96), where the doubt of Coleridge, J. in *Dewar* v. *Smiley* (11 A. & E. 913) is disposed of.

In a case where the question between the parties was solely one of law, and the facts were not in dispute, Abbott, C. J., refused to certify (*Wemys* v. *Greenwood*, 2 C. & P. 483). In an

action for a libel in a newspaper, where special pleas were pleaded, Tindal, C. J., certified, stating that he would not have done so if there had not been such plea (*Roberts* v. *Brown*, 6 C. & P. 757). In an action for penalties, Abbott, C. J., refused to certify because, as the case had not been gone into, he could not certify on a mere view of the record (*Orme* v. *Crockford*, 1 C. & P. 537); *sed quære*, the general application of this principle.

Upon writs of inquiry.

See R. G., H. T. 1853, r. 46, *post*.

Special juries in London and Middlesex, how struck.

110. In London and Middlesex special jurors shall be nominated and reduced by and before the undersheriff and secondary respectively, in like manner as by the master before this act, upon the application of either party entitled to a special jury, and his obtaining a rule for such purpose; and the names of the jurors so struck shall be placed upon a panel, which shall be delivered and annexed to the nisi prius record, in like manner and upon the same terms as hereinbefore provided with reference to the panel of common jurors; and upon the trial the special jury shall be ballotted for, and called in the order in which they shall be drawn from the box, in the same manner as common jurors.

As to the practice, see R. G., H. T. 1853, rr. 44, 45, 46, and note thereto, *post*, and to the preceding and following sections.

The rule referred to is granted upon a "hand" motion of counsel.

If the defendant obtains a rule for a special jury he waives all irregularity in the notice of trial, even though the issue be partly incomplete (*Berresford* v. *Geddes*, L. R. 2 C. P. 285).

Remedy for delay by notice of trial by special jury.

111. Where the defendant in any case, or plaintiff in replevin, gives notice of his intention to try the cause by a special jury, and the venue is in London or Middlesex, the court or a judge, if satisfied that such notice is given for the purpose of delay, may order that the cause be tried by a common jury, or make such other order as to the trial of the cause as such court or judge shall think fit.

The court or a judge may either order the cause to be tried in its order (when, if no special jury is in attendance, it will be tried by a common jury), or directly order the cause to be tried by a common jury, which will probably only be done on affidavits of facts justifying such an order, as "the general right of the subject to try a case by special jury can only be touched by affidavit" (*Per* Pollock, C. B., *Dunn* v. *Cox*, 16 M. & W. 439). But a special jury rule does not deprive the party of his right to try by a common jury until a special jury has been struck. Where a cause had been set down for trial, and the defendant obtained a special jury rule, on which the jury was nominated, and on the same day the plaintiff obtained a judge's order that the cause should be tried in its order, unless a special jury were first

struck; and no special jury being struck, the plaintiff tried by a common jury, it was held that the cause was properly tried (*Dawson* v. *Smith*, 1 L. M. & P. 151). It would seem, therefore, that the proper way to proceed in such a case, is to obtain an order that the cause be tried in its order, unless the special jury is previously struck. The Court of Common Pleas refused a rule *nisi* to discharge a rule for a special jury, where the jury had been nominated although not reduced (*White* v. *Eastern Union Railway Company*, 11 C. B. 575).

When a cause was set down for trial at the first sittings in term, and the defendant obtained a special jury rule, on an affidavit stating the pleadings, and showing that no notice had been given to the under-sheriff, and averring the deponent's belief that the rule had been obtained for delay, the court granted a rule *nisi*, calling on defendant to show cause on the third day of the sittings why the special jury rule should not be set aside on that day, unless the jury were previously nominated (*Devanoge* v. *Berthwick*, 2 L. M. & P. 277).

Notice to sheriff of trial by special jury.

112. Where notice has been given* to try by special jury, either party may, six days before the first day of the sittings in London or Middlesex, or adjournment day in London, or commission day of the assizes, give notice to the sheriff that such cause is to be tried by a special jury; and in case no such notice be given no special jury need be summoned or attend, and the cause may be tried by a common jury, unless otherwise ordered by the court or a judge.

In country causes, the plaintiff, after giving the defendant ten days' notice, must give the sheriff six days' notice of his intention to try by special jury. In town causes, the plaintiff must not only strike the jury under s. 110 (*ante*, p. 98), according to the present practice, but must, in addition, give six days' notice to the sheriff, otherwise his cause may be tried by a common jury. (See R. G., H. T. 1853, r. 47, *post*.)

So the defendant must, both in town and country causes, if the special jury has been obtained by him, give the sheriff the proper notice; if he fail to do so, the cause may in the absence of a special jury be tried by a common jury under the next section (*Cawley* v. *Knowles*, 16 C. B., N. S. 107). The defendant's notice to the plaintiff must be more than six days (s. 109, n. *ante*, p. 97), the notice to the sheriff, six days.

No special jury need be summoned, unless notice is given (see s. 113, *infra*).

If special jury not summoned, cause to be tried by a common jury.

113. In all cases where notice is not given to the sheriff that the cause is to be tried by a special jury, and by reason thereof a special jury is not summoned or does not attend, the cause may be tried by a common jury, to be taken from the panel of common

* Probably notice to the sheriff may be given under this section, although notice to the opposite party, under s. 109 (*ante*, p. 97), may not have been given, in consequence of the defendant having been put under terms to take short notice of trial.

jurors, in like manner as if no proceedings had been had to try the cause by a special jury.

As to this enactment, see *Montague* v. *Smith* (17 Q. B. 688; L. J. 21, Q. B. 73), and cases there cited.

View to be by rule without writ.

114. A writ of view shall not be necessary or used, but, whether the view is to be had by a common or special jury, it shall be sufficient to obtain a rule of the court or judge's order, directing a view to be had; and the proceedings upon the rule for a view shall be the same as the proceedings heretofore had under a writ of view; and the sheriff, upon request, shall deliver to either party the names of the viewers, and shall also return their names to the associate for the purpose of their being called as jurymen upon the trial.

See R. G., H. T. 1853, rr. 48, 49, *post*.

Where it shall appear to the court to be proper and necessary that the jurors should have the view of the messuages, lands or place in question, in order to the better understanding of the evidence, "the court may order," &c. (4 Anne, c. 16, s. 8). An order for a view will not be granted in an action for work and labour as a bricklayer: "The necessity of a view seems to apply chiefly to actions of a local nature, such as trespass *qu. cl. fr.*, nuisances, and the like" (Parke, B., in *Stones* v. *Menhem*, 5 Ex. 382).

But see now C. L. P. A. 1854, s. 58, *post*.

Before applying the party must get from his opponent the name of his shower, and take it and that of his own shower, with a memorandum of the time fixed for the view, to the Master, that the rule or order may be properly drawn up, as an omission of the names will be irregular (*Taylor* v. *Thompson*, 1 Dowl. 218); and see *Stones* v. *Menhem* (*ubi supra*). From the form there given an order under this section may be prepared.

Proceedings before jurors so returned same as before this act.

115. The jurors contained in such panels as aforesaid shall be the jurors to try the causes at the assizes and sittings for which they shall be summoned respectively; and all such proceedings may be had and taken before such juries in like manner, and with the like consequences in all respects, as before any jury summoned in pursuance of any writ or writs of *venire facias juratores*, *distringas juratores*, or *habeas corpora juratorum*, before this act.

Trial by Proviso.

Defendant's right to try, upon default of the plaintiff, preserved.

116. Nothing herein contained shall affect the right of a defendant to take down a cause for trial, after default by the plaintiff to proceed to trial, according to the course and practice of the court; and if records are entered for trial both by the plaintiff and the

defendant, the defendant's record shall be treated as standing next in order after the plaintiff's record in the list of causes, and the trial of the cause shall take place accordingly.

In all cases where the plaintiff after issue joined makes default in proceeding to trial when he ought to have done so (see Chit. Arch. 8th ed., vol. ii., p. 1298), the defendant may have the action tried by proviso, that is, he may make up the issue, give the plaintiff notice of trial, make up the Nisi Prius record, carry it down and enter it and proceed to trial as in ordinary cases as if he were proceeding as plaintiff. In replevin, prohibition, *quare impedit* and error in fact, both parties being actors the defendant may make up the record and proceed to trial although the plaintiff have committed no default. See *Dennis* v. *Dennis* (2 Wms. Saund. 336), and Chit. Arch. 12th ed., vol. ii., 1492. This proceeding is applicable to trials before the sheriff (*Harrison* v. *Sutton*, 12 M. & W. 307).

The taking down a cause for trial by proviso is the mode by which a plaintiff is prevented from keeping a cause hanging over the head of a party for an indefinite time; and the court refused to make a rule for a stay of proceedings absolute, even after the defendant had become bankrupt and obtained his certificate (*Whittaker* v. *Watson*, 6 Dowl. 429).

See R. G., H. T. 1853, r. 42, *post*.

As to when a defendant must resort to this remedy, see s. 101, n. (*ante*, p. 93).

The defendant must give the plaintiff "notice of trial by proviso" as in ordinary cases (s. 97, *ante*, p. 89); but it was not necessary under the old practice to give a term's notice of proceedings where four terms had elapsed (*Theobald* v. *Crickmore*, 2 B. & A. 594); but the R. G., H. T. 1853, r. 171, *post*, seems now to require a month's notice in such a case.

If the defendant does not proceed to trial after notice, he will have to pay to the plaintiff the costs of the day (s. 99, *ante*, p. 91; *King* v. *Pippett*, 1 T. R. 696); and when both give notice, and neither tries, they are liable to each other for these costs, unless by consent of both the cause is made a *remanet* (*Blow* v. *Wyatt*, 4 M. & W. 407).

The defendant's record will stand in order after the plaintiff's in the list; but if the plaintiff has not given sufficient notice of trial, his entry will be of no effect, and the defendant may go to trial on his own; and if the plaintiff does not appear to it, he will be nonsuited (*Brown* v. *Ottley*, 1 B. & A. 253), which is the proper course to take; though if, instead of nonsuiting the plaintiff, the defendant takes a verdict, the court will, in general, only set it aside in order to enter a nonsuit (*Hodgson* v. *Foster*, 1 B. & C. 110).

Admission of Documents.

And with respect to the admission of documents, be it enacted as follows:—

Admission of documents.

117. Either party may call on the other party by notice to admit any document, saving all just excep-

tions; and in case of refusal or neglect to admit, the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless at the trial the judge shall certify that the refusal to admit was reasonable, and no costs of proving any document shall be allowed unless such notice be given, except in cases where the omission to give the notice is, in the opinion of the master, a saving of expense.

Form of notice.

A form of notice to admit is given by R. G., H. T. 1853, r. 29, which see, and note thereon, *post.*

See as to abuse of such a form, *Edmunds* v. *Great Western Railway Company* (12 C. B. 419).

See as to costs after neglect to give notice, or to admit upon notice, R. G., H. T. 1853, r. 30, *post.*

Extent of enactment as to notice to admit.

These provisions apply to every document a party means to adduce in evidence, and are not confined to documents in his custody or control (*Rutter* v. *Chapman*, 8 M. & W. 388); in which case the costs of proving signatures to a petition for a charter, under 1 Vict. c. 71, s. 49, were not allowed, no notice to admit having been given; and "any document" includes, *semble*, a foreign judgment (*Smith* v. *Bird*, 3 Dowl. 310).

A party who proposes to adduce a document in evidence is bound, therefore, in every case, in order to entitle himself to the costs of proving it, to give a notice to admit, that the other party may have an opportunity of admitting it, and thus saving costs. And this rule applies to documents the validity of which is directly in issue (*Spencer* v. *Barough*, 9 M. & W. 425, where the attorney on the other side, when applied to, had refused to admit, on the ground that the document was a forgery).

The court will rather enlarge than restrict the provisions of the section (*Per* Alderson, B., in *Rutter* v. *Chapman*, *ubi supra*). So, where plaintiff's attorney was in possession of a probate of a will essential to the defendant's case, and on being called upon to give an undertaking to produce it, refused to do so, and the defendant then warned him that an exemplification of the will must be procured at a heavy expense, it was held that the defendant who obtained the verdict, was entitled only to the expense of an ordinary copy, as he might have called on the plaintiff to admit a copy (*Goldstone* v. *Tovey*, 6 Bing. N. C. 274).

Effect of admission.

The admission is to be made, "saving all just exceptions." A party admitting his handwriting to a bill, is not precluded from objecting to its admissibility in evidence on the ground of its being unstamped (*Vane* v. *Whittington*, 2 Dowl. N. S. 757). But where a party admitted a document described as a "counterpart lease," and at the trial the instrument turned out to be a lease with a counterpart stamp only, he was considered precluded from taking the objection (*Doe* d. *Wright* v. *Smith*, 8 A. & E. 255). The admission of the mere signature will not dispense with the production of the bill at the trial (*Vane* v. *Whittington*, *ubi supra*; see *Chaplin* v. *Levy*, 9 Exch. 531, where there was no reserve of just exceptions). Nor will the admission that the copy is a true

copy dispense with the necessity of accounting for the non-production of the original, before the copy can be admitted in evidence (*Sharpe* v. *Lambe*, 11 A. & E. 805). An admission of a document, as of a certain date, will preclude the party from calling for an explanation, if the date appears to be written on an erasure (*Poole* v. *Palmer*, 1 Car. & M. 69). So, after the admission of a deed, an objection to its being received in evidence, on the ground of an interlineation, is waived (*Freeman* v. *Steggall*, 14 Q. B. 202; L. J. 19, Q. B. 18). So an admission of a bill "drawn by the plaintiff upon, and directed to the defendants as A. & Co., and accepted by B. for the defendants as A. & Co.," precludes the defendants from denying the authority of B. to bind A. & Co. by such acceptance, and it is not a mere admission that he signed an acceptance purporting to bind A. & Co. (*Wilkes* v. *Hopkins*, 1 C. B. 737; and see *Hunt* v. *Wise*, 1 F. & F. 445); but a party may, without peril of costs in any event, refuse to admit documents, when he is also required to admit the authority of the writer (*Oxford, &c., Railway Company* v. *Scudamore*, 1 H. & N. 666). An admission once made cannot, it would seem, be withdrawn: it will bind the party, for instance, on a new trial (*Doe* v. *Bird*, 7 C. & P. 6).

A formal admission only should be relied upon (*Holford* v. *Hughes*, 10 W. R. 60; Ex., M. T. 1861).

See further upon the effect of admissions, *Hawk* v. *Freund* (1 F. & F. 294), and *Hills* v. *London Gas Light Company* (1 F. & F. 346).

Time within which to give notice to admit.

The notice to admit must be given a reasonable time before the trial. The object of the notice necessitates the observance of this. A notice to admit documents, the originals of which were in Harwich, served on the agent in London of the defendant's attorney, who lived in Harwich, four days before the commission-day at Newcastle, was not considered a reasonable time before the trial, and the Master, who had disallowed the costs of proving the documents, was ordered to review his taxation (*Tynn* v. *Billingsley*, 3 Dowl. 310).

The costs of proving a document which is not admissible in evidence will not be allowed (*Phillips* v. *Harris*, 1 Car. & M. 492); nor where the proof of the documents is not to the satisfaction of the judge (*Doe* d. *Peters* v. *Peters*, 1 Car. & K. 279).

The omission of a notice to admit will be excusable, when a saving of expense will be thereby effected, as where a party necessarily called to prove some other part of the case can prove the documents. See R. G., H. T. 1853, r. 30, *post*.

A notice to admit holds good upon a subsequent trial of the cause (*Hope* v. *Beadon*, 2 L. M. & P. 593, as to notice to produce; and *Doe* v. *Bird*, *ubi supra*).

As to obtaining the judge's certificate, see *Day* v. *Vinson* (L. J. 33, Ex. 171).

Notice under Probate Court Act.

Of a somewhat similar nature to a notice to admit is the statutory notice of a party's intention to adduce a probate in evidence of a devise of real estate. This notice is given under sect. 64 of the Probate Court Act (20 & 21 Vict. c. 77), which enacts, that "in any action at law or suit in equity, where, according to the existing law, it would be necessary to produce and prove an original will in order to establish a devise or other tes-

tamentary disposition of or affecting real estate, it shall be lawful for the party intending to establish in proof such devise or other testamentary disposition to give to the opposite party, ten days at least before the trial or proceeding in which the said proof shall be intended to be adduced, notice that he intends at the said trial or other proceeding to give in evidence as proof of the devise or other testamentary disposition the probate of the said will or the letters of administration with the will annexed, or a copy thereof, stamped with any seal of the Court of Probate; and in every such case such probate or letters of administration, or copy thereof respectively, stamped as aforesaid, shall be sufficient evidence of such will and of its validity and contents, notwithstanding the same may not have been proved in solemn form, or have been otherwise declared valid in a contentious cause or matter, as herein provided, unless the party receiving such notice shall, within four days after such receipt, give notice that he disputes the validity of such devise or other testamentary disposition."

Id. 612

As to the meaning of the above words, "sufficient evidence," see *Barraclough* v. *Greenhough* (L. R. 2 Q. B. 1; reversed on appeal, 2 Weekly Notes, 1867, p. 193, T.T.). In this case the Court of Exchequer Chamber intimated a strong opinion that the notice should be served on the attorney of the opposite party and not upon the party in person.

Proof of admissions.

118. An affidavit of the attorney in the cause, or his clerk, of the due signature of any admissions made in pursuance of such notice, and annexed to the affidavit, shall be in all cases sufficient evidence of such admissions.

The admission, if made, will, of course, be either generally of the documents mentioned in the notice, or of some one or more of them. The admission may be endorsed on or subscribed to the notice.

Care should be taken in examining the terms of the notice and of the admission sought; and particularly that there be the proper reserve of all just exceptions (*Chaplin* v. *Levy*, 9 Exch. 531).

Where a plaintiff was nonsuited in consequence of the defendant's counsel refusing to admit certain documents, which had been agreed to be admitted, a new trial was granted on the ground of a breach of good faith, with costs to be paid by the defendant (*Doe* d. *Tindal* v. *Roe*, 5 Dowl. 420).

Proof of notice to produce.

119. An affidavit of the attorney in the cause, or his clerk, of the service of any notice to produce in respect of which notice to admit shall have been given, and of the time when it was served, with a copy of such notice to produce annexed to such affidavit, shall be sufficient evidence of the service of the original of such notice, and of the time when it was served.

An enumeration of the cases in which it is necessary to give a notice to produce, forms a part of the law of evidence; as does

the statement of the amount of proof of possession by the party who has the original, which is required, in order to make secondary evidence admissible. The object of the notice is merely to give the opposite party sufficient opportunity to produce the document if he pleases; and not that he may be enabled to prepare evidence to explain, nullify or confirm it (*Dwyer* v. *Collins*, 7 Ex. 639; L. J. 21, Ex. 225).

Form of notice.

The notice should be in writing, and entitled in the cause, and should specify the document sufficiently for the information of the party to whom it is addressed. The words "all and every letters written by the plaintiff to the defendant, and relating to the matters in dispute of the action," were held sufficient to let in secondary evidence of a particular letter of which the date is not specified (*Jacob* v. *Lees*, 2 M. & Rob. 33); and "all accounts relating to the matters in question in this cause" was held sufficient to let in secondary evidence of an account for work done, which had been delivered to the defendant and admitted by him to be correct though no dates were specified (*Rogers* v. *Constance*, 2 M. & R. 179). Notice to produce a letter purporting to enclose an account, is sufficient notice to produce the account (*Engall* v. *Druce*, 9 W. R. 536; C. P., E. T. 1861).

Service of notice to produce.

What will constitute a sufficient service of notice is a question for the judge at the trial. It should be served on the attorney or agent (*Houseman* v. *Roberts*, 5 C. & P. 394); or on the party himself (*Hughes* v. *Budd*, 8 Dowl. 315); and the sufficiency of the time allowed to search for the documents, the production of which is required, will generally depend on the facts of each case. It should be given within a reasonable time before the trial (*George* v. *Thompson*, 4 Dowl. 656): and the night before the trial is not generally a reasonable time (*Atkins* v. *Meredith*, 4 Dowl. 658); though if it were to produce a document shown to be in the possession of the attorney, it would be sufficient (*Lloyd* v. *Mostyn*, 2 Dowl. N. S. 476); even if the service is in the evening, at the office of the attorney (*Leaf* v. *Butt*, 1 Car. & M. 461); and on one of his clerks, if he has the management of the cause (*Gibbons* v. *Powell*, 9 C. & P. 634).

Sufficiency of notice.

Three days' notice to produce letters which had been used in a chancery suit six years before the trial (*Sturge* v. *Buchanan*, 10 A. & E. 598); two days' notice to the attorney to produce documents, the party himself being abroad (*Bryan* v. *Wagstaff*, 2 C. & P. 126), have been held *sufficient*. A notice to produce, served on the commission-day, the attorney having left his office for the assizes (*George* v. *Thompson*, *ubi supra*); a notice served on the evening before the trial, on the defendant's attorney at his residence, twenty miles from the place of trial, where the defendant resided in the same town with the attorney, but was not at home till midnight (*Howard* v. *Williams*, 9 M. & W. 725); a notice served at the office of the attorney on a woman who took care of the chambers, the evening before the trial (*Sims* v. *Kitchen*, 5 Esp. 46), were all held *insufficient*. A notice to produce served in the assize town is, in general, *insufficient* (*Foster* v. *Pointer*, 9 C. & P. 718; and see *Coombs* v. *Bristol and Exeter Railway Company*, 1 F. & F. 206).

Where a document is in court at the time of the trial, a notice to produce it then is sufficient (*Dwyer* v. *Collins*, 7 Ex. 639; L. J. 21, Ex. 225).

A document was called for under a notice to produce; a docu-

ment was thereupon produced, which the other side denied to be the document called for; Byles, J., held that he must decide that question, before he admitted secondary evidence (*Frouds* v. *Hobbs*, 1 F. & F. 612).

Proof of service.

Service of notice to produce may be proved by an affidavit by the attorney in the cause, or his clerk, where notice to admit has been given. This mode of proof will generally be resorted to in country causes. But to render this affidavit admissible, it would appear that proof of the service of the notice to admit must first be given, by calling the person who served such notice, for the proof of the service of a notice to admit may not be by affidavit.

It may be observed that a notice to produce given for one trial need not be repeated in the case of a new trial (*Hope* v. *Beadon*, 2 L. M. & P. 593; L. J. 21, Q. B. 25).

EXECUTION.

And with respect to execution, be it enacted as follows:—

Execution after trial.

120. A plaintiff or defendant, having obtained a verdict in a cause tried out of term, shall be entitled to issue execution in fourteen days, unless the judge who tries the cause, or some other judge, or the court, shall order execution to issue at an earlier or later period, with or without terms.

As to the *incipitur* and signing judgment, see s. 206, *post*.

It will be observed, that this enactment is confined to causes tried *out of term*, and in which a verdict has been obtained; but by R. G., H. T. 1853, r. 57, *post*, similar provision is made for causes tried in term, and for nonsuits. The application to expedite or stay execution may be made either to the judge who tries the cause, to a judge at chambers, or to the court. When a judge at chambers or the court is asked to grant early execution, it is necessary to show facts justifying such an application. If they appear in evidence upon the trial, and the application is made there and then, no affidavit is necessary; but otherwise, an affidavit is required (*Ruddich* v. *Simmons*, 1 M. & Rob. 184; *Gervas* v. *Burtchley*, *ib.* 150). The application was formerly made to the judge at the trial, by virtue of the power given to him by 1 Will. 4, c. 7, s. 2, to certify for immediate execution, and no affidavit was required; the necessity of a party waiting till the following term before signing judgment, being often deemed a sufficient cause to justify the granting of a certificate. The power given by the above statute to the judge who tries the cause is left untouched by this section; and it is now usual to grant speedy (four days) execution in all substantially undefended actions for liquidated claims; and (in ejectment) to recover vacant possessions.

Application to stay execution.

No application to stay execution need be made if a point is reserved for the court or leave is given to move to enter a nonsuit or verdict. The terms (if any) on which execution will be stayed are in the discretion of the judge making the order.

When execution may issue.

Final judgment being signed, the power of the judge is at an end; and execution follows according to the terms of the order,

which the judge has no power afterwards to alter (*Lander* v. *Gordon*, 7 M. & W. 218). Where the judge grants a certificate for speedy execution, the plaintiff should issue one writ of execution for the amount of the verdict and costs (*Smith* v. *Dickenson*, 5 Q. B. 602).

Final judgment must be signed.

Final judgment must be signed in all cases before execution can be issued (*Colburn* v. *Hall*, 5 Dowl. 534). No rule for judgment is necessary after verdict, or on the return of a writ of inquiry (R. G., H. T. 1853, r. 55, *post*).

Where certificate granted.

Where a certificate, however, is granted for *immediate* execution, notice of taxation of costs may be given on the day of trial for the following day, and on that day judgment may be signed and execution issued (*Alexander* v. *Williams*, 4 D. & L. 132).

Speedy execution is generally understood to be in *four days*.

This section does not interfere with the provisions of the 3 & 4 Will. 4, c. 42, regarding writs of trial; which see *post* (R. G., H. T. 1853, r. 34, n., *post*).

Upon judges' orders.

As to time for signing judgment on a judge's order, see *Perkins* v. *National Assurance Society* (2 H. & N. 71); *Morris* v. *Barritt* (7 C. B., N. S. 139).

After award.

Where a verdict is taken for the plaintiff in an action, subject to a reference of the cause and of all matters in difference, by order of Nisi Prius, and an award is made directing the verdict in the action to stand for the plaintiff for a certain sum, and finding another sum to be due to the defendant in respect of the matters in difference, the plaintiff is entitled to sign judgment for the sum awarded to him in the action in fourteen days after the making of the award (*O' Toole* v. *Pott*, 7 E. & B. 102).

See generally R. G., H. T. 1853, rr. 55—57, and 70—77, *post*.

Ground writs abolished.

121. It shall not be necessary to issue any writ directed to the sheriff of the county in which the venue is laid, but writs of execution may issue at once into any county, and be directed to and executed by the sheriff of any county, whether a county palatine or not, without reference to the county in which the venue is laid, and without any suggestion of the issuing of a prior writ into such county.

Writs in counties palatine to be directed to the sheriff.

122. All writs of every description issuing out of the Superior Courts of Common Law at Westminster, to be executed in the counties palatine, shall be directed and delivered to the sheriffs of such counties, and executed and returned by them to the courts out of which such writs are issued, in the same manner in all respects as writs are executed and returned by the sheriffs of other counties.

Expenses of execution.

123. In every case of execution the party entitled to execution may levy the poundage-fees and expense of the execution, over and above the sum recovered.

This section applies even though under the County Courts Acts the party issuing execution is not entitled to costs (*Armitage* v. *Jessop*, L. R. 2 C. P. 12).

At common law the sheriff is bound to execute the Queen's writs without fee or reward. His right to poundage fees is given by statute.

Fees on a fi. fa.

Upon executing a *fi. fa.* the sheriff is by 28 Eliz. c. 4, entitled to 12*d.* for every 20*s.*, if the sum levied does not exceed 100*l.*, and to 6*d.* for every 20*s.* over and above that amount. If he exacts more he is liable to a penalty; and to the party grieved in treble damages and in treble costs (*Deacon* v. *Morris*, 2 B. & A. 393). The sheriff's fees are now regulated by 1 Vict. c. 55, which also makes extortion summarily punishable (see *Gill* v. *Jose*, 6 E. & B. 618), but does not deprive the party aggrieved of his remedy by action (*Pilkington* v. *Cooke*, 16 M. & W. 615; *Wrightup* v. *Greenacre*, 10 Q. B. 1; *Benton* v. *Lawrence*, 5 Exch. 816). This statute does not affect the previous stat. 28 Eliz.; so that the sheriff levies his poundage under the former statute, and his fees under the latter (*Davies* v. *Griffiths*, 7 Dowl. 204).

Poundage on fi. fa.

The sheriff is not entitled to poundage where there has been no levy, as when the money is paid (*Graham* v. *Grill*, 2 M. & S. 296; *Nash* v. *Dickenson*, L. R. 2 C. P. 252), or tendered (*Colls* v. *Coates*, 11 A. & E. 826); or where the levy is only colourable (*Brun* v. *Hutchinson*, 2 D. & L. 43). But he is entitled where there has been a seizure (*Chapman* v. *Bowlby*, 1 Dowl. N. S. 83), though the judgment and execution are afterwards set aside for irregularity (*Bullen* v. *Ansley*, 6 Esp. 111). He is entitled to poundage on the whole proceeds of the sale, as where a portion is paid over to the landlord for rent (*Davies* v. *Edmonds*, 12 M. & W. 31).

See, in cases of interpleader, C. L. P. A. 1860, s. 12, n., *post*.

Fees on a ca. sa.

Upon executing a *ca. sa.* the sheriff was formerly entitled to the poundage given by 28 Eliz. c. 4; but by 5 & 6 Vict. c. 98, he is now only entitled to the fees allowed under 1 Vict. c. 55; and therefore the extra costs of watching a defendant in custody, too ill to be removed, will not be allowed the sheriff as expenses of the execution (*Jones* v. *Robinson*, 2 Dowl. N. S. 1044; see also *Cooper* v. *Hill*, 6 C. B., N. S. 703; L. J. 28, C. P. 311).

The costs of an abortive *fi. fa.* cannot be levied under a subsequent *ca. sa.* (*Marquis of Salisbury* v. *Ray*, 8 C. B., N. S. 193; L. J. 29, C. P. 225).

Poundage on an elegit.

Upon executing an *elegit*, the sheriff is entitled to poundage on the yearly value of the lands actually extended (*Carter* v. *Hughes*, 2 H. & N. 714), under 3 Geo. 1, c. 15, s. 16 (*Nash* v. *Allen*, 4 Q. B. 784).

Extortion.

The statute 1 Vict. c. 55, gives a summary remedy by action against the sheriff for extortion, see *Masters* v. *Lowther* (11 C. B. 948; L. J. 21, C. P. 130). As to the liabilities of the sheriff for the acts of his officer, see *Wood* v. *Finnis* (L. J. 21, Ex. 138), where the cases are collected; also *Ash* v. *Dawnay* (8 Ex. 244; L. J. 22, Ex. 59); and as to extortion, see *Masters* v. *Lowther* (*ubi supra*); *Holmes* v. *Sparkes* (12 C. B. 242); *Gill* v. *Jose* (*ubi supra*); *Halliwell* v. *Heywood* (10 W. R. 780, Ex. T. T. 1862); *Long* v. *Bray, ex parte Wright* (10 W. R. 841, Ex. T. T. 1862); see also *Beston* v. *Lawrence* (5 Exch. 816), and cases there cited as to action under 28 Eliz. c. 4, for treble damages for extortion.

There was formerly a doubt who should pay the expenses of a *fi. fa.*; and the 43 Geo. 3, c. 46, s. 5, to remove it, enacted that, in every case of execution against the goods of a *defendant*, the plaintiff might levy the poundage fees, &c. This enactment did not extend to an execution against the person (*Hayley* v. *Hackett*, 5 M. & W. 620); and it applied only to executions at the suit of the plaintiff. This section, it will be observed, permits in all cases the *party entitled* to execution to levy the poundage, &c. *Who to pay.*

Although the sheriff should be put to trouble and "expenses of execution," he is not entitled to more expenses than those allowed under 1 Vict. c. 55 (*Phillips* v. *Lord Canterbury*, 1 D. & L. 283; *Davies* v. *Edmonds*, 1 D. & L. 267; *Gaskell* v. *Sefton*, 3 D. & L. 267; *Jones* v. *Robinson*, *ubi supra*).

The sheriff may be compelled to return the writ, and after he has returned it, either party may compel the sheriff, by a judge's order, to deliver particulars of the manner in which he has disposed of the proceeds of the execution; see hereon *Levi* v. *Hale* (L. J. 29, C. P. 127).

124. A writ of execution issued after the commencement of this act, if unexecuted, shall not remain in force for more than one year from the teste of such writ, unless renewed in the manner hereinafter provided; but such writ may, at any time before its expiration, be renewed, by the party issuing it, for one year from the date of such renewal, and so on from time to time during the continuance of the renewed writ, either by being marked with a seal bearing the date of the day, month and year of such renewal (such seal to be provided and kept for that purpose at the office of the masters of the court out of which such writ issued), or by such party giving a written notice of renewal to such sheriff, signed by the party or his attorney, and bearing the like seal of the court; and a writ of execution so renewed shall have effect, and be entitled to priority, according to the time of the original delivery thereof. *Writ of execution to remain in force for one year and to be renewed if necessary.*

As to the sheriff's duty on the execution of writs, see *Hunt* v. *Hooper* (1 D. & L. 626), where the cases are collected; *White* v. *Prebble* (L. J. 22, C. P. 115), and *Levi* v. *Hale* (*ubi supra*): and as to indorsement of address of defendant, *Childers* v. *Wooler* (2 E. & E. 287; L. J. 29, Q. B. 129).

125. The production of a writ of execution, or of the notice renewing the same, purporting to be marked with such seal, showing the same to have been renewed according to this act, shall be sufficient evidence of its having been so renewed. *Production of renewed writ evidence of renewal.*

Sheriff or gaoler may discharge prisoner by authority of attorney in the cause.

126. A written order under the hand of the attorney in the cause, by whom any writ of *capias ad satisfaciendum* shall have been issued, shall justify the sheriff, gaoler or person in whose custody the party may be under such writ, in discharging such party, unless the party for whom such attorney professes to act shall have given written notice to the contrary to such sheriff, gaoler or person in whose custody the opposite party may be; but such discharge shall not be a satisfaction of the debt, unless made by the authority of the creditor; and nothing herein contained shall justify any attorney in giving such order for discharge without the consent of his client.

The attorney in the suit has no right, after judgment, to settle the action on any other terms than payment of the debt and costs (see *Butler* v. *Knight*, L. R. 2 Ex. 109). The sheriff should not discharge a debtor from custody on a *ca. sa.* without receiving the whole debt and costs (*Savory* v. *Chapman*, 11 A. & E. 829; *Wood* v. *Finnis*, 7 Exch. 363). If the sheriff allowed the debtor to go, on the authority of the attorney, he was formerly liable for an escape (*Connop* v. *Chalis*, 2 Exch. 484). The attorney has authority, however, to order the sheriff to withdraw from possession under a writ of *fi. fa.* (*Levi* v. *Abbott*, 4 Exch. 591); and by this section the sheriff will now be justified in discharging a party from custody under a *ca. sa.*, on a written order of the attorney in the cause, unless the party at whose suit the party is in custody gives the sheriff notice to the contrary.

Discharge of prisoner in custody on ca. sa.

The *taking* of the person in execution operates as an election, by the execution creditor, to pursue, against the execution debtor, that means of execution, to the exclusion of the other means of execution provided by the law; but it is not an actual extinguishment of the debt (*Cohen* v. *Cunningham*, 8 T. R. 123; *Ward* v. *Bromhead*, L. J. 21, Ex. 216; *National Assurance Company* v. *Best*, 2 H. & N. 605; *Thompson* v. *Parish*, 5 C. B., N. S. 685; see also *Jauralde* v. *Parker*, 6 H. & N. 431; L. J. 30, Ex. 237, cited in C. L. P. A. 1854, s. 61, n. *post*). This section provides that the *discharge* shall not be a satisfaction of the debt, unless made by the authority of the creditor. If the attorney gives an order for a discharge without authority, he is liable to the creditor in the value of the custody of the debtor at the time of the discharge; see *Arden* v. *Goodacre* (11 C. B. 371); and *Macrae* v. *Clarke* (L. R. 1 C. P. 403).

This section does not alter the law as to the power of the attorney. It does not enable him to discharge a party by virtue of his ordinary retainer, and he ought, therefore, to have express authority from his client to enable him to do so. It merely protects the sheriff in discharging the prisoner on the written authority of the attorney, and leaves the liability of the attorney to his client unaffected.

See as to authority given by attorney to a third person to receive debt and costs paid by execution debtor to sheriff (*Hemming* v. *Hale*, 7 C. B., N. S. 487; L. J. 29, C. P. 137).

127. It shall not be necessary in any case to sue out a writ of *habeas corpus ad satisfaciendum* to charge in execution a person already in the prison of the court, but such person may be so charged in execution by a judge's order made upon affidavit that judgment has been signed and is not satisfied; and the service of such order upon the keeper of the prison for the time being shall have the effect of a detainer.

Proceedings for charging in execution a person already in prison of the court.

This section is limited in its application to prisoners in the Queen's prisons; and if a prisoner is in the custody of the sheriff only, a *ca. sa.* must be issued and delivered to the sheriff (*Owen* v. *Owen*, 2 B. & Ad. 805).

Supersedeas.

By R. G., H. T. 1853, r. 124, *post*, the plaintiff must cause the defendant, when in prison under a *capias ad resp.* at his suit, to be charged in execution within the term next after trial or judgment; if the prisoner is in custody in the country it is sufficient that the writ be in the hands of the under-sheriff's deputy in London within the time for charging in execution (*Williams* v. *Waring*, 4 Dowl. 200).

PROCEEDINGS TO REVIVE.

Execution in six years without revival.

And with respect to proceedings for the revival of judgments and other proceedings by and against persons not parties to the record, be it enacted as follows:—

128. During the lives of the parties to a judgment, or those of them during whose lives execution may at present issue within a year and a day without a *scire facias*, and within six years from the recovery of the judgment, execution may issue without a revival of the judgment.

Formerly, when a year and a day had elapsed without execution being issued on a judgment, the law presumed it to be satisfied; and at common law the only remedy (in personal actions) was by an action of debt on the judgment. The stat. of West. 2, c. 45, enabled a *scire facias*, or warning, to be issued, on which, failing appearance or defence, execution might be obtained. And, if a party was prevented from suing out execution by a writ of error (*Howard* v. *Pitt*, 1 Show. 402; *Winter* v. *Lightbound*, 1 Str. 301); or by an injunction (*Mitchell* v. *Cue*, 2 Burr. 660), the time did not begin to run till the judgment below was affirmed, or the injunction dissolved. If the year had expired before error was brought, and the plaintiff in error was nonsuited or discontinued, or the judgment was affirmed, execution might have issued without a *scire facias*; for the writ of error revived the judgment (*Bellasis* v. *Hanford*, Cro. Jac. 364). The year (after which a *scire facias* was necessary) was computed from the day of signing judgment (*Simpson* v. *Gray*, Barnes, 197).

When time begins to run.

Execution may now be issued within six years from the recovery of the judgment, during the lives of the parties to the judgment, without revival. In case of the death of any of the parties, a suggestion on the record, or a writ of revivor, is necessary.

Execution issued after the six years is voidable (*Goodtitle* v. *Badtitle*, 9 Dowl. 1009), and not void (*Blanchenay* v. *Burt*, 4 Q. B. 707).

Judgment to be revived by writ or with leave of court, or judge, by suggestion.

129. In cases where it shall become necessary to revive a judgment by reason either of lapse of time, or of a change, by death or otherwise, of the parties entitled or liable to execution, the party alleging himself to be entitled to execution may either sue out a writ of revivor in the form hereinafter mentioned, or apply to the court or a judge for leave to enter a suggestion upon the roll, to the effect that it manifestly appears to the court that such party is entitled to have execution of the judgment and to issue execution thereupon; such leave to be granted by the court or a judge upon a rule to show cause or a summons to be served according to the present practice, or in such other manner as such court or judge may direct, and which rule or summons may be in the form contained in the Schedule (A.) to this act annexed, marked No. 7, or to the like effect.

It will be observed that, where the revival of a judgment has become necessary (by the death of a party, for instance), there are two courses open to the judgment creditor, or his representative. He may apply to a judge in vacation, or to the court in term time, for leave to enter a suggestion; and if leave is given, the suggestion is to be entered in the form prescribed; and execution is thereupon to issue (s. 130, *infra*). If leave is refused, he may still proceed by writ of revivor (s. 130).

Application for leave to enter a suggestion.

The facts upon which the application is made, for instance, that judgment was signed more than six years before the date of the application, and is still unsatisfied, must be shown to the court by affidavits (see s. 134, *post*, p. 115). If the application is made by executors, the affidavit must further show that probate of the will has been granted to them (*Vogel* v. *Thompson*, 1 Exch. 60). The form of the rule *nisi* in the former case, and of the summons in the latter, is prescribed above.

The rule to show cause may be served abroad (*Stockport* v. *Hawkins*, 1 D. & L. 204). Personal service is not necessary, if the defendant can be shown to be avoiding the service of the rule (*Dixon* v. *Thorold*, 9 Dowl. 827).

The words, "or otherwise," in this section will include a change by bankruptcy or insolvency (see s. 140, *post*, p. 120).

Proceedings upon application for suggestion to revive judgment.

130. Upon such application, in case it manifestly appears that the party making the same is entitled to execution, the court or judge shall allow such sug-

gestion as aforesaid to be entered in the form contained in the Schedule (A.) to this act annexed, marked No. 8, or to the like effect, and execution to issue thereupon, and shall order whether or not the costs of such application shall be paid to the party making the same; and in case it does not manifestly so appear, the court or judge shall discharge the rule or dismiss the summons with or without costs: provided nevertheless, that in such last-mentioned case the party making such application shall be at liberty to proceed by writ of revivor or action upon the judgment.

See as to what should appear upon the affidavits, in the case of a *judgment* more than twenty years old; per Wightman, J., *Loveless* v. *Richardson* (2 Jur. N. S. 716, Bail Court, T. T. 1856).

Writs of revivor and proceedings thereon.

131. The writ of revivor shall be directed to the party called upon to show cause why execution should not be awarded, and shall bear teste on the day of its issuing; and, after reciting the reason why such writ has become necessary, it shall call upon the party, to whom it is directed, to appear, within eight days after service thereof, in the court out of which it issues, to show cause why the party at whose instance such writ has been issued should not have execution against the party to whom such writ is directed, and it shall give notice that, in default of appearance, the party issuing such writ may proceed to execution; and such writ may be in the form contained in the Schedule (A.) to this act annexed, marked No. 9, or to the like effect, and may be served in any county, and otherwise proceeded upon, whether in term or vacation, in the same manner as a writ of summons; and the venue in a declaration upon such writ may be laid in any county; and the pleadings and proceedings thereupon, and the rights of the parties respectively to costs, shall be the same as in an ordinary action.

Revivor—when issued.

The writ of revivor lies on a judgment in ejectment (*Doe* v. *Roe*, 2 Dowl. N. S. 690). If the judgment is under ten years old it may be sued out as a matter of course (s. 134, *post*, p. 115). It must be sued out of the court in which the judgment was given (Com. Dig. Pl. 3, L. 3); and as it is a judicial writ it must follow the judgment (*Panton* v. *Hale*, 2 Salk. 598). A writ of revivor of a judgment of assets, *quando acciderint*, would be bad, if it prayed execution of assets generally (*Mara* v. *Quin*, 6 T. R. 1; and see *Smith* v. *Tateham*, 2 Exch. 205).

The writ is sued out on a *præcipe*, as in the case of a writ of summons (*ante*, p. 3). It bears *teste* on the day of its issuing.

The form of writ given in the schedule is to be followed; and it is to be served, and otherwise proceeded upon, as a writ of summons.

As to appearance to the writ, see s. 133 (*post*, p. 115).

Amending the writ.

By analogy to the practice on proceedings by *scire facias*, the writ of revivor, if irregular, may be quashed at the costs of the plaintiff, if the defendant has appeared (*Oliverson* v. *Latour*, 7 Dowl. 605). It may be amended, also, to make it correspond with the record (*Braswell* v. *Jeco*, 9 East, 316), and this after a plea of *nul tiel* record (*Parkins* v. *Petit*, 1 B. & P. 275; and see *Holland* v. *Phillips*, 10 A. & E. 149, and the cases there referred to).

A plaintiff may not quash his own writ of *scire facias*, or revivor, after a defendant has appeared, except on payment of costs (R. G., H. T. 1853, r. 78, *post*).

A second writ of revivor is necessary, where the six years have expired since judgment was signed; the proceedings on the first writ had to be recited in the second (*Walker* v. *Thellusson*, 1 Dowl. N. S. 578; but now *quære*).

Proceedings in revivor.

The venue in the declaration on a writ of revivor may be laid in any county, and the pleadings and other proceedings are to be the same as in ordinary actions. The defendant will not be at liberty to plead to the declaration any matter which might have been pleaded or set up as a defence to the original action (*Bradley* v. *Eyre*, 11 M. & W. 432). Fraud in obtaining the original judgment must be specially pleaded, though it may afford ground for moving to set aside the proceedings (*Thomas* v. *Williams*, 3 Dowl. 655; *Dodgson* v. *Scott*, 2 Exch. 457).

It may be observed that the writ of *scire facias* is, to some extent, superseded by the writ of revivor; but it is not abolished.

Writs of *scire facias* in other cases to be tested, directed and proceeded upon in like manner.

Scire facias.

132. All writs of *scire facias* issued out of any of the Superior Courts of Law at Westminster against bail on a recognizance; *ad audiendum errores*; against members of a joint-stock company or other body, upon a judgment recorded against a public officer or other person sued as representing such company or body, or against such company or body itself; by or against a husband to have execution of a judgment for or against a wife; for restitution after a reversal in error; upon a suggestion of further breaches after judgment for any penal sum, pursuant to the statute passed in the session holden in the eighth and ninth years of the reign of King William the Third, intituled "An Act for the better preventing frivolous and vexatious Suits;" or for the recovery of land taken under an *elegit*, shall be tested, directed and proceeded upon, in like manner as writs of revivor.

This section, it may be noticed, does not affect writs of *scire*

facias issued from the common law side of the Court of Chancery (12 & 13 Vict. c. 109).

The marriage of a woman, plaintiff or defendant, before judgment, is provided for by s. 141 (*post*, p. 122).

As to *scire facias* against members of a public company, see *Clowes* v. *Brettel* (11 M. & W. 461); *Scott* v. *Uxbridge, &c. Ry. Company*, L. R. 1 C. P. 596; *Ilfracombe Ry. Company* v. *Devon & Somerset Ry. Company*, L. R. 2 C. P. 15; *Williams* v. *Sidmouth Ry. & Harbour Company*, L. R. 2 Ex. 284; *Rigby* v. *Dublin, &c., Ry. Company*, 2 Weekly Notes, p. 176, C. P., T. T., and Notes to the Companies Clauses Act, 1845 (8 & 9 Vict. c. 16), s. 86, in Chit. Stat., 3rd edit., vol. i., pp. 739, 740).

Proceedings against executors upon a judgment of assets *in futuro* may now be had in like manner as writs of revivor (C. L. P. A. 1854, s. 91, *post*).

133. Notice in writing to the plaintiff, his attorney or agent, shall be sufficient appearance to a writ of revivor. Appearance to writ of revivor.

134. A writ of revivor to revive a judgment less than ten years old shall be allowed without any rule or order; if more than ten years old, not without a rule of court or a judge's order; nor, if more than fifteen, without a rule to show cause. As to issue of writ of revivor upon judgment more than ten years old.

Under the old practice, orders for a *sci. fa.* were granted without a summons, where the judgment was less than fifteen years old, on an affidavit setting forth the judgment, and stating it to be still unsatisfied (Tidd's Forms, 477). This affidavit ought to be made by the party; or if by the attorney, it should be by the attorney in the cause when judgment was obtained, otherwise an affidavit from such attorney should, if possible, be obtained (*Norfolk* v. *Spencer*, 4 Dowl. 746). But an affidavit by the attorney suing out the writ will be sufficient in some cases, as where plaintiffs in revivor, executors, were infants and abroad at the time of the judgment (*Smith* v. *Mee*, 1 D. & L. 907). The application for leave to sue out this writ will not, it would appear, be within the general rule of all the courts, that a matter cannot be agitated *twice;* so that a fresh application, if the first is refused or a judge's order thereon abandoned, may be made on fresh materials (*Dodgson* v. *Scott*, 2 Exch. 457).

The rule to revive after fifteen years is *nisi*. The judgment itself cannot be impeached on showing cause against the rule, but a cross-motion to set it aside should be made for that purpose (*Thomas* v. *Williams*, 3 Dowl. 655). Where the defendant was in America, but was the owner of houses in England, service of the rule was ordered to be, by sticking it up in the office, and serving copies on the tenants in possession (*Macdonald* v. *Maclaren*, 11 M. & W. 465).

Death, Marriage and Bankruptcy.

And with respect to the effect of death, marriage and bankruptcy upon the proceedings in an action, be it enacted as follows:—

135. The death of a plaintiff or defendant shall not Action not to abate by death.

cause the action to abate, but it may be continued as hereinafter mentioned.

Only if action survive.

This and the following sections give a right to the personal representative of a deceased sole plaintiff, to enter a suggestion of the death of the plaintiff, and to continue the action only in those cases where the cause of action would before that act have survived to the representative, and he could have commenced an action in his representative character (*Flinn* v. *Perkins*, L. J. 32, Q. B. 10, Bail Court, Crompton, J.)

This section did not, perhaps, include *replevin*, which is not an "action" within the meaning given to that word by the interpretation clause (s. 277, *post*); but see now 19 & 20 Vict. c. 108, s. 65 (C. L. P. A. 1860, s. 22, n., *post*).

As judicial proceedings are to be considered as taking place at the earliest period of the day on which they are done; it was held, in a case where judgment was signed and execution issued on the day on which the defendant died, that the judgment and execution were regular (*Wright* v. *Mills*, 4 H. & N. 488; L. J. 28, Ex. 223).

See as to proceedings by a defendant or his representative, when default is made in prosecuting the action after abatement by reason of death, C. L. P. A. 1854, s. 92, *post*.

Proceedings in case of death of one or more of several plaintiffs or defendants.

136. If there be two or more plaintiffs, or defendants, and one or more of them should die, if the cause of such action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the action shall not be thereby abated; but such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants.

Death of one or more of several plaintiffs.

This section is in the words of 8 & 9 Will. 3, c. 11, s. 7. If the death happens before issue joined, it should be suggested in making up the issue (*Farr* v. *Denn*, 1 Burr. 362). If it happens after issue joined, it should be suggested on the *Nisi Prius* record (*Rex* v. *Cohen*, 4 Stark. N. P. 511); and the suggestion must be entered, and the facts thus brought to the knowledge of the court before any further proceedings can be taken (*Pinkus* v. *Sturch*, 5 C. B. 474; *Larchin* v. *Buckle*, 1 L. M. & P. 740).

An action by husband and wife, in right of the wife, survives to her upon her husband's death (*Sherrington* v. *Yates*, 12 M. & W. 855, Ex. Ch.)

Affidavits to be used in the cause after the death of any of the parties should be entitled in the names of the survivors only (*Larchin* v. *Buckle*, *ubi supra*).

Where there are two or more plaintiffs or defendants, and one or more of them die after judgment, execution by *fi. fa.* or *ca. sa.* may be had within six years for or against the survivors, without revivor. The execution should follow the judgment, and be sued out in the joint names of all the parties; but a joint execution may be levied upon one only, by directing the sheriff to levy accordingly (2 Wms. Saund. 72, l).

137. In case of the death of a sole plaintiff or sole surviving plaintiff,* the legal representative of such plaintiff may, by leave of the court or a judge, enter a suggestion of the death, and that he is such legal representative, and the action shall thereupon proceed; and, if such suggestion be made before the trial, the truth of the suggestion shall be tried thereat, together with the title of deceased plaintiff, and such judgment shall follow upon the verdict in favour of or against the person making such suggestion, as if such person were originally the plaintiff.

Proceedings in case of the death of a sole plaintiff.

The entry of this suggestion must be made before any further proceeding in the action (s. 136, n., *ante*, p. 116). It can be made only by leave of the court or a judge. The suggestion, it would appear, is traversable (*Watson* v. *Quilter*, 1 D. & L. 244), and the truth of it, if made before trial, may be tried thereat. In *Barnwell* v. *Sutherland* (1 L. M. & P. 159) the action had proceeded to trial, in the name of a public officer, substituted immediately before the trial, in the place of one who had died, and whose death was suggested on the record; and the verdict was set aside, as the suggestion had been entered without the authority of the court, and without an opportunity being given to the defendant to traverse the fact suggested. In this case, in which are collected all the cases relating to the entry of suggestions, a point was raised, but not decided, whether (if a suggestion was traversable) the time between the 10th of August and 24th of October was excluded from the computation of time to plead. It was contended that to extend the 2 Will. 4, c. 39, s. 11, in this way, would have excluded a plea *puis darrein continuance* during the same period; and it may be observed, that by s. 69 (*ante*, p. 69), it is expressly enacted, that a plea *puis darrein continuance* may be pleaded between 10th August and 24th October.

See as to proceedings by a *defendant* upon abatement by death, C. L. P. A. 1854, s. 92, *post*.

C. L. P. A. 1854, s. 92.

138. In case of the death of a sole defendant or sole surviving defendant, where the action survives, the plaintiff may make a suggestion, either in any of the pleadings, if the cause has not arrived at issue, or in a copy of the issue, if it has so arrived, of the death, and that a person named therein is the executor or administrator of the deceased; and may thereupon serve such executor or administrator with a copy of the writ and suggestion, and with a notice, signed by the plaintiff or his attorney, requiring such executor or administrator to appear within eight days

Proceeding upon death of sole or sole surviving defendant.

* The words "where the action survives," which are in the following section, are not used here, but this section must be construed as if those words were inserted in it (*Flinn* v. *Perkins*, L. J. 32, Q. B. 10, cited in note to s. 135, *ante*, p. 116).

after service of the notice, inclusive of the day of such service, and that in default of his so doing the plaintiff may sign judgment against him as such executor or administrator; and the same proceedings may be had and taken in case of non-appearance after such notice as upon a writ against such executor or administrator in respect of the cause for which the action was brought; and in case no pleadings have taken place before the death, the suggestion shall form part of the declaration, and the declaration and suggestion may be served together, and the new defendant shall plead thereto at the same time; and in case the plaintiff shall have declared, but the defendant shall not have pleaded before the death, the new defendant shall plead at the same time to the declaration and suggestion; and in case the defendant shall have pleaded before the death, the new defendant shall be at liberty to plead to the suggestion, only by way of denial, or such plea as may be appropriate to and rendered necessary by his character of executor or administrator, unless by leave of the court or a judge he should be permitted to plead fresh matter in answer to the declaration; and in case the defendant shall have pleaded before the death, but the pleadings shall not have arrived at issue, the new defendant, besides pleading to the suggestion, shall continue the pleadings to issue in the same manner as the deceased might have done, and the pleadings upon the declaration and the pleadings upon the suggestion shall be tried together; and in case the plaintiff shall recover, he shall be entitled to the like judgment * in respect of the debt or sum sought to be recovered and in respect of the costs prior to the suggestion, and in respect of the costs of the suggestion, and subsequent thereto, he shall be entitled to the like judgment † as in an action originally commenced against the executor or administrator.

This legislation is new. It would seem that the provisions of the first clause as to the service of a notice on the executor or administrator of a deceased defendant override the provisions in the clauses which follow; so that in all cases, the substituted defendant must have this notice served upon him, and in all cases, if he fails to appear, the plaintiff may sign judgment; and this even if the original defendant has pleaded, or the parties were, at the time of the death, at issue.

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* This is judgment as to debt and costs *de bonis testatoris* only.
† This is judgment as to costs *de bonis testatoris et si non de bonis propriis*.

If a sole or sole surviving defendant dies after writ issued, and before declaration, the plaintiff should, in the declaration, suggest the death, and that a person therein named is executor or administrator of the deceased; and then serve on such executor or administrator a copy of the writ and declaration, and a notice requiring him to appear in eight days after service, otherwise judgment. *After writ issued and before declaration.*

The substituted defendant must appear within the eight days, otherwise the plaintiff may sign judgment in default of appearance, and he must also plead within eight days after notice to plead, which may be given with the declaration, otherwise judgment by *nil dicit* may be signed (see p. 65, *ante*).

If the plaintiff has declared before the death of the original defendant, but such defendant has not pleaded, the plaintiff should serve the executor or administrator with a copy of the writ, and, with the suggestion above referred to, and with a notice requiring him within eight days to appear, and within eight days to plead to the suggestion and to the declaration. *After declaration and before plea.*

If the original defendant has pleaded, the plaintiff may suggest the death in his replication, serve with the replication a copy of the original writ, the notice to appear above referred to, a notice to plead to the suggestion, and a notice to rejoin (s. 78, n. *ante*, p. 78). The substituted defendant will be entitled to eight days to appear and plead to the suggestion (s. 63, *ante*, p. 65), and so he gets eight days to rejoin. *After plea.*

The substituted defendant may only plead, as of right, in addition to the pleas of the original defendant, such pleas as are appropriate to his character of executor or administrator; but he may obtain leave from a judge to plead fresh matter to the declaration.

The substituted defendant, besides pleading to the suggestion, must continue the pleadings precisely as the deceased defendant ought to have done.

If the parties have been at issue before the original defendant's death, the suggestion is to be made in the issue; a copy of which is to be served with the notice to appear, and with a copy of the original writ. *After issue joined.*

Judgment in default of appearance seems to follow in all cases; the truth of the suggestion is triable as a collateral issue at the trial; and judgment, if for the plaintiff, follows the verdict as if the substituted executor or administrator had been originally sued.

Where a plaintiff discontinued, after appearance by an administratrix, she was held to be entitled to the *whole* of defendant's costs of suit (*Benge* v. *Swaine, Administratrix, &c.*, 15 C. B. 784; L. J. 23, C. P. 182).

139. The death of either party between the verdict and the judgment shall not hereafter be alleged for error, so as such judgment be entered within two terms after such verdict. *Death between verdict and judgment.*

If either party dies after a special verdict, or special case, or during the argument of a motion in arrest of judgment, or for a new trial, judgment may be entered, at common law, after the death, as of the term in which judgment should have been given, *nunc pro tunc* (*Carlisle* v. *Garland*, 9 Bing. 85). So in the case of a verdict subject to an award, when the award is made in the

lifetime of both parties, but the successful party dies pending a rule to set it aside, judgment may be entered *nunc pro tunc* (*Bridges* v. *Smith*, 8 Bing. 29; see also *Heathcote* v. *Wing*, 11 Exch. 355; L. J. 25, Ex. 23). So where leave is given to the defendant to enter a verdict, and he dies after the trial and before the next term, the motion to enter the verdict may be made without putting the executors on the record, and the verdict entered accordingly (*Freeman* v. *Rosher*, 13 Q. B. 780). So, where a cause is referred to a barrister to state a special case, it may be stated after the death of one of the parties, and judgment entered accordingly (*James* v. *Crane*, 15 M. & W. 379). The delay being the act of the court, and not of the party, judgment is entered *nunc pro tunc*, that the parties may not be prejudiced (2 Wms. Saund. 72; and see *Miles* v. *Williams*, 9 Q. B. 47; *Freeman* v. *Tranah*, 12 C. B. 406; L. J. 21, C. P. 214; and *Heathcote* v. *Wing*, *ubi supra*; *Moore* v. *Roberts*, 3 C. B., N. S. 844, where, in the absence of a legal representative of the deceased plaintiff, his former attorney in the cause showed cause against a rule obtained by the defendant to enter judgment of nonsuit *nunc pro tunc*).

This section is in the words of 17 Car. 2, c. 8, s. 1. Under the similar provisions of that statute, it was held that the death of either party *before* the assizes was not remedied (this case is provided for by other sections of this statute); but if the party died after the assizes began, though the trial were after the death, it was within the remedy of the statute, the *assizes* being but one day in law: so if the party died after the first day of the *sittings*, and before trial, or at the adjourned sittings (*Chetham* v. *Starkevant*, 1 D. & L. 631), the judgment is entered by or against the party as if he were living, and must be signed within two terms after the verdict; for signing it is an entering within this section (2 Wms. Saund. 72 n.; and see *Frewin* v. *Lethbridge*, 7 W. R. 442; Ex. E. T. 1859).*

This enactment is not confined to actions which would have survived; therefore, an executor may enter up judgment on a verdict obtained by the testator in an action for libel (*Palmer* v. *Cohen*, 2 B. & Ad. 966; *Kramer* v. *Waymark*, L. R. 1 Ex. 241).

A writ of revivor must follow the judgment, and recite it as entered in the lifetime of the party deceased; that is to say, it should be in the same form as where the writ is sued out by a personal representative upon a judgment entered up in the actual lifetime of the original party.

Proceedings in case of death after interlocutory and before final judgment.

140. If the plaintiff in any action happen to die after an interlocutory judgment and before a final judgment obtained therein, the said action shall not abate by reason thereof, if such action might be originally prosecuted or maintained by the executor or administrator of such plaintiff; and if the defendant die after such interlocutory judgment and before final judgment therein obtained, the said action shall not abate, if such action might be originally prosecuted or maintained against the executor or administrator of

* See as to entering up a judgment for purposes of execution, s. 206, and R. G., H. T. 1853, rr. 70, 71, *post*.

such defendant; and the plaintiff, or if he be dead after such interlocutory judgment, his executors or administrators, shall and may have a writ of revivor, in the form contained in the schedule (A.) to this act annexed, marked No. 9,* or to the like effect, against the defendant, if living after such interlocutory judgment, or if he be dead, then against his executors or administrators, to show cause why damages in such action should not be assessed and recovered by him or them; and if such defendant, his executors or administrators, shall appear at the return of such writ, and not show or allege any matter sufficient to arrest the final judgment, or shall make default, a writ of inquiry of damages shall be thereupon awarded, or the amount for which final judgment is to be signed shall be referred to one of the masters, as hereinbefore provided; and upon the return of the writ, or delivery of the order with the amount indorsed thereon to the plaintiff, his executors or administrators, judgment final shall be given for the said plaintiff, his executors or administrators, prosecuting such writ of revivor, against such defendant, his executors or administrators respectively.

Death of plaintiff.

On the death of the plaintiff, the action does not abate; if it is such as might have originally been maintained by the executor or administrator. An action for libel, not being such an action, does, therefore, abate by the death of the plaintiff, after interlocutory judgment, and after the execution of the writ of inquiry, if the death takes place before final judgment (*Ireland* v. *Champness*, 4 Taunt. 884).

Death of defendant.

Neither on the death of a defendant does the action abate, if it is one which might have been maintained against the executors or administrators. Where, however, two defendants are jointly sued, and one dies after interlocutory and before final judgment, the plaintiff cannot proceed against the executors of the deceased, for the action, being joint, survives against the other defendant (*Fort* v. *Oliver*, 1 M. & S. 242).

Writ of inquiry.

In the case of the death of a defendant, when the action was one which might have been maintained against the executors or administrators, it has been decided that, when the writ of inquiry had not been executed, the writ of *sci. fa.* ought to be for the executors or administrators to show cause why the damages should not be *assessed* and *recovered* against them (Tidd's Pract. Forms, 494; *Smith* v. *Harmon*, 1 Salk. 315). The writ of revivor given by this section is to the same effect; and if the executors do not appear, or, appearing, do not show matter sufficient to arrest the judgment, a writ of inquiry, or a reference to the master (s. 94 *ante*, p. 87), may be necessary.

Death of defendant after interlocutory

In the case of the death of a defendant after interlocutory judgment, and after the execution of a writ of inquiry, but before

* This form seems more applicable in the case of death after final judgment.

and before final judgment.

final judgment, the writ of revivor given by this section is not, it would appear, applicable. The *sci. fa.*, in such cases, called on the executors or administrators to show cause why the damages should not be *adjudged* to the plaintiff, or, in case of his death, to his executors or administrators (2 Wms. Saund. 729). Nor is there any provision to avoid the necessity of two writs of *sci. fa.* (or revivor); one, to make the executors or administrators parties to the record; the other, to give them an opportunity of pleading want of assets, or other matter that an executor may plead to a *sci. fa.* on final judgment against the testator (see 2 Wms. Saund. 72 r).

Marriage not to abate action.

141. The marriage of a woman plaintiff or defendant shall not cause the action to abate, but the action may, notwithstanding be proceeded with to judgment; and such judgment may be executed against the wife alone, or, by suggestion or writ of revivor pursuant to this act, judgment may be obtained against the husband and wife, and execution issue thereon; and in case of a judgment for the wife, execution may be issued thereupon by the authority of the husband without any writ of revivor or suggestion; and if in any such action the wife shall sue or defend by attorney appointed by her when sole, such attorney shall have authority to continue the action or defence, unless such authority be countermanded by the husband, and the attorney changed according to the practice of the court.

This section does not apply in the case of the marriage of a female defendant *after* judgment (*Morris* v. *Coates*, 25 L. T. 176, Q. B., T. T. 1855).

If an action is brought by or against a married woman as a *feme sole*, the defendant in the first case, the wife in the second, may plead in abatement (ss. 36, 37, *ante*, pp. 43, 44). This section provides for the event of marriage after action brought.

Formerly pleadable in abatement.

If a woman married after action brought, and before trial, the coverture was also pleadable in abatement, either directly by such a plea, or by a plea *puis darrein continuance* (*Walker* v. *Golling*, 11 M. & W. 78). Coverture can no longer be thus pleaded.

Execution.

Formerly, again, if a *feme sole* obtained judgment, or a judgment was recovered against her, and she married before execution, a *sci. fa.* must have been brought by or against the husband to obtain execution (2 Wms. Saund. 72, l.) In the case of judgment against the wife, the party who has recovered such judgment may either sue out execution against her alone, by her maiden name (*Thorpe* v. *Argles*, 1 D. & L. 831); or may suggest the judgment (s. 129, *ante*, p. 112), or bring an action upon the judgment, or sue out a writ of revivor (s. 131, *ante*, p. 113), against the husband and wife; one of which latter courses it will be the more prudent to follow, for, if the wife has no separate property, she will be discharged out of execution (*Edwards* v. *Martyn*, 17 Q. B. 693; L. J. 21, Q. B. 86).

Bankruptcy and insol-

142. The bankruptcy or insolvency of the plaintiff

in any action, which the assignees might maintain for the benefit of the creditors, shall not be pleaded in bar to such action, unless the assignees shall decline to continue, and give security for the costs thereof, upon a judge's order to be obtained for that purpose, within such reasonable time as the judge may order, but the proceedings may be stayed until such election is made; and in case the assignees neglect or refuse to continue the action, and give such security within the time limited by the order, the defendant may, within eight days after such neglect or refusal, plead the bankruptcy.*

vency of plaintiff, when not to abate action.

Formerly, a plea of the plaintiff's bankruptcy or insolvency, and an assignment of his effects, whereby his rights of action vested in the assignees, was a good plea in bar to the further maintenance of the action (2 Wms. Saund. 72 m, note *k*). The question, what rights of action vest in the assignees, is discussed fully in *Rogers* v. *Spence* (13 M. & W. 571; 12 Cl. & Fin. 700), and *Drake* v. *Beckham* (2 H. L. C. 679): see also *Morgan* v. *Taylor* (5 C. B., N. S. 653).

Plea of bankruptcy or insolvency.

This section contemplates the bankruptcy or insolvency of the plaintiff after action brought (*Stanton* v. *Collier*, 3 E. & B. 274); and if it occurs after plea, the bankruptcy must be pleaded *puis darrein continuance* (s. 69, n., *ante*, p. 70). But it cannot be pleaded until eight days after the assignees have declined to continue the action, and to give security for costs; and the expiration of these eight days would probably be deemed the time "when the matter of the plea arose," within s. 69 (*ante*, p. 69). The defendant should take out a summons at chambers, calling upon the assignees to make their election, and in the meantime that proceedings be stayed.

See for former practice in bankruptcy, *Cross* v. *Robertson* (7 M. & G. 640); and in insolvency, *Gavin* v. *Allan* (7 Ex. 306; L. J. 21, Ex. 80).

If the action is brought by the plaintiff and his wife (as upon a note made to the wife before marriage, or other *chose in action* reducible into possession), and the plaintiff becomes bankrupt, it does not appear that his assignees may continue the action under this section (see *Sherrington* v. *Yates*, 12 M. & W. 855; *Dingley* v. *Yates*, L. J. 26, Ex. 55).

If a plaintiff, who has recovered *interlocutory* judgment, becomes a bankrupt before *final* judgment, his assignees may proceed to final judgment in his name to have execution. So, if the defendant brings error on a judgment, and the plaintiff becomes bankrupt, the assignees may proceed to an affirmance of the judgment in the name of the bankrupt. In either case the assignees must sue out a writ of revivor to have execution (2 Wms. Saund. 72 m, n).

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* This section does not in terms enact that the "*insolvency*" may be pleaded; but "bankruptcy" may be interpreted here to include "insolvency;" and now by the Bankruptcy Act, 1861, s. 232, "insolvency," as a procedure distinct from "bankruptcy," is abolished.

ARREST OF JUDGMENT, AND JUDGMENT NON OBSTANTE VEREDICTO.

And with respect to the proceedings upon motions to arrest the judgment, and for judgment *non obstante veredicto*, be it enacted as follows:—

Upon motion in arrest of judgment, pursuant to 1 Will. 4, c. 7, or for judgment *non obstante veredicto*, omitted facts may by leave of the court be suggested.

143. Upon any motion made in arrest of judgment, or to enter an arrest of judgment, pursuant to the statute passed in the first year of his late Majesty King William the Fourth, intituled "An Act for the more speedy Judgment and Executions in Actions brought in his Majesty's Courts of Law at Westminster, and in the Court of Common Pleas of the County Palatine of Lancaster, and for amending the Law as to Judgment on a *Cognovit actionem* in Cases of Bankruptcy," or for judgment *non obstante veredicto*, by reason of the non averment of some alleged material fact or facts of material allegation, or other cause, the party, whose pleading is alleged or adjudged to be therein defective, may, by leave of the court, suggest the existence of the omitted fact or facts, or other matter, which, if true, would remedy the alleged defect; and such suggestion may be pleaded to by the opposite party within eight days after notice thereof, or such further time as the court or a judge may allow; and the proceedings for trial of any issues joined upon such pleadings shall be the same as in an ordinary action.

Arrest of judgment.

In this section are introduced the words "*or other cause;*" from which it would appear that in every case of a motion in arrest of judgment, or for judgment *non ob. ver.*, a suggestion of what is necessary to remedy the defect may be entered; and the section goes on to enact, that a suggestion of the omitted facts, "or other matter," may be made.

In what cases.

The cases in which judgment will be arrested are collected in the notes to *Hambleton* v. *Veere* (2 Wms. Saund. 169), and in *Kitchenman* v. *Sheel* (3 Exch. 49).

Judgment non obstante veredicto.

When judgment *non ob. ver.* will be awarded, and in what cases a re-pleader will be ordered, see 2 Wms. Saund. 319 d. (*h*).

In *Manley* v. *Boycot* (2 E. & B. 46, L. J. 22, Q. B. 265), it was held that to entitle a defendant to a rule for a suggestion under this section, such facts must be clearly and satisfactorily alleged upon affidavit as would, if added by the suggestion, make the pleading good; see also *Fisher* v. *Bridges* (2 E. & B. 118; L. J. 22, Q. B. 270 and 2 E. & B. 128, n., more fully L. J. 22, Q. B. 273, n.), and *Murgatroyd* v. *Robinson* (7 E. & B. 391).

Motion in arrest of judgment.

The motion in arrest of judgment, or for judgment *non ob. ver.*, must be made within four days after the trial, if it has taken place in term, and if out of term, within the first four days of the next term (R. G., H. T. 1853, r. 50, *post*; *Thomas* v. *Jones*, 4 M. &

W. 28); unless by consent of the other party further time is allowed by the court (*Harrison* v. *Great Northern Railway Company*, 11 C. B. 542; *S. C., sub nom. Harris* v. *Great Northern Railway Company*, L. J. 21, C. P. 16).

A motion in arrest of judgment may be made after judgment by default, but not after judgment on demurrer (*Edwards* v. *Blunt*, 1 Str. 425). Error will lie after a judgment has been arrested (*Cook* v. *Oxley*, 3 T. R. 654, n.)

Effect of judgment non obstante veredicto.

Judgment *non ob. ver.* is interlocutory. Where there are no other pleas on the record than those on which the plaintiff has obtained judgment *non ob. ver.*, and his claim is unliquidated, the plaintiff may sue out a writ of inquiry to assess his damages, without leave of the court (*Shepherd* v. *Halls*, 2 Dowl. 453); but if the action is only brought to recover nominal damages, as to try a right, the verdict for the defendant may be set aside by the court, and a verdict with nominal damages entered for the plaintiff (*Selby* v. *Robinson*, 6 T. R. 758).

These motions are not frequently made, now that parties may demur and plead; and even when there is no demurrer, but the pleading appears doubtful at the trial, it is common to reserve by consent its merits for the determination of the court, and to get the jury to assess damages contingently.

The 1 Will. 4, c. 7, which enables the judge before whom a cause is tried to certify for immediate execution; and provides that judgment may thereupon be signed although the court is not sitting, and that execution may be issued; further enacts, that the judgment may be vacated, execution stayed or set aside, an arrest of judgment entered, or a new trial or new writ of inquiry granted, and that a writ of restitution may thereupon be issued, as on the reversal of a judgment by writ of error.

Judgment to follow result of suggestion.

144. If the fact or facts suggested be admitted, or found to be true, the party suggesting shall be entitled to such judgment as he would have been entitled to, if such fact or facts or allegations had been originally stated in such pleading, and proved or admitted on the trial, together with the costs of, and occasioned by, the suggestion and proceedings thereon; but if such fact or facts be found untrue, the opposite party shall be entitled to his costs of, and occasioned by, the suggestion and proceedings thereon, in addition to any other costs to which he may be entitled.

Costs of abortive issues.

145. Upon an arrest of judgment, or judgment *non obstante veredicto*, the court shall adjudge to the party, against whom such judgment is given, the costs occasioned by the trial of any issues of fact, arising out of the pleading for defect of which such judgment is given, upon which such party shall have succeeded; and such costs shall be set off against any money or costs adjudged to the opposite party, and execution may issue for the balance, if any.

Formerly, upon a motion in arrest of judgment, each party paid his own costs (*Cameron* v. *Reynolds*, Cowp. 407); and on a judgment *non ob. ver.*, neither party was entitled to the costs of imma-

terial issues (*Goodburn* v. *Bowman*, 2 Dowl. 206). If the rule *nisi* is discharged, the party successfully showing cause is entitled to the costs of doing so, as costs in the cause (*Hodgkinson* v. *Wyatt*, 1 D. & L. 668).

In an action on the case, it was referred, by an order of Nisi Prius, to an arbitrator to find the facts and to state a case, the costs of the reference, award, and special case, to be costs in the cause, and to abide the event thereof. The arbitrator found a special case, upon which the Court of Exchequer directed all the issues to be entered for the plaintiff. The Court of Exchequer Chamber affirmed the finding of the issues, but arrested the judgment, on account of a defect in the declaration. It was held, that neither party was entitled to the general costs of the cause, or to any costs in error; but that under this section, the plaintiff was entitled to the costs of the issues; and consequently, by the terms of the order of reference, he was entitled to the costs of the reference, award, and special case (*Whaley* v. *Laing*, 5 H. & N. 480; L. J. 29, Ex. 313).

Error.

And with respect to proceedings in error, be it enacted as follows:—

The law as to writs of error is collected in the notes to *Jacques* v. *Cesar* (2 Wms. Saund. 100).

These sections do not apply to informations in the nature of *quo warranto* (*Reg.* v. *Seale*, 5 E. & B. 1).

Error to be brought within six years.

146. No judgment in any cause shall be reversed, or avoided for any error or defect therein, unless error be commenced, or brought and prosecuted with effect, within six years after such judgment signed or entered of record.

The period within which error might formerly be brought was twenty years (10 & 11 Will. 3, c. 14). The court will not summarily interfere to quash the proceedings (s. 156, *post*, p. 133) if the error is brought after six years; for the party bringing error is not to be deprived of the benefit of replying any of such exceptions as are set out in s. 147, *infra* (*Higgs* v. *Evans*, 2 Str. 837).

Proviso for disabilities.

147. If any person that is or shall be entitled to bring error as aforesaid is or shall be, at the time of such title accrued, within the age of twenty-one years, *feme covert*, *non compos mentis*, or beyond the seas, then such person shall be at liberty to bring error as aforesaid, so as such person commences, or brings and prosecutes the same with effect, within six years after coming to or being of full age, discovert, of sound memory, or return from beyond the seas; and if the opposite party shall, at the time of the judgment signed or entered of record, be beyond the seas, then error may be brought, provided the proceedings be commenced and prosecuted with effect within six

years after the return of such party from beyond seas.

148. A writ of error shall not be necessary or used in any cause, and the proceeding to error shall be a step in the cause, and shall be taken in manner hereinafter mentioned; but nothing in this act contained shall invalidate any proceedings already taken or to be taken by reason of any writ of error issued before the commencement of this act. Writ of error abolished.

The proceeding in error given by this section does not apply where there has been a change of parties since the judgment: and in such cases, a *sci. fa. ad audiendum errores* may still be required (*Curlewis* v. *Earl of Mornington*, L. J. 27, Q. B. 269); nor does it apply to criminal proceedings; nor to outlawry (*Solomon* v. *Graham*, 6 E. & B. 309; *Arding* v. *Holmer*, 1 H. & N. 85; L. J. 25, Ex. 261). *In what cases.*

A writ of error lies from all inferior courts of record (except the statutory County Courts, and the Courts of Record in London, the Cinque Ports, and the Stannaries) to the Queen's Bench for error in law; and although the writ of error is abolished generally, the other words of the section seem to limit the abolition to cases where error can be a "step in the cause:" see cases cited *supra*.

Error is either *in law* or *in fact*: as to error in law, see s. 155 (*post*, p. 132); and as to error in fact, see s. 158 (*post*, p. 134). Error does not lie on a feigned issue (*Snook* v. *Mattock*, 5 A. & E. 239; *King* v. *Simmons*, 1 H. L. C. 755). But error lies on a judgment by default under s. 27 (*ante*, p. 32); *Hodsoll* v. *Baxter*, E. B. & E. 884; L. J. 28, Q. B. 61; and on a judgment recorded under s. 45 (*ante*, p. 50); and on a special case (C. L. P. A. 1854, s. 32, *post*). It cannot be brought until judgment has been given on the whole record (*Becham* v. *Knight*, 7 Dowl. 409); and, accordingly, if error is brought on a judgment on demurrer to pleas that go to the whole cause of action, if issues of fact are undisposed of, the proceedings in error will be quashed (*Tolson* v. *Kaye*, 7 Scott, N. R. 222). It lies on a judgment of nonsuit (*Evans* v. *Swete*, 2 Bing. 326). A *writ of error* was considered a new action, and the party bringing error might do so in the name of a different attorney from the attorney in the cause, without obtaining a judge's order to change (*Batchelor* v. *Ellis*, 7 T. R. 337). Error is now a "step in the cause;" so that the proceedings (*semble*) should go on in the name of the attorney on the record; and the order of the names of the parties should no longer be reversed, as was done formerly when a defendant brought error, and is still sometimes done.

As to costs, see *Fisher* v. *Bridges* (4 E. & B. 666; L. J. 24, Q. B. 165; *Marshall* v. *Jackson*, 4 E. & B. 669, n.; L. J. 24, Q. B. 166, n.); and as to defendant below, when bringing error, being compelled to give security for costs, when resident abroad, see *Hill* v. *Fox* (3 H. & N. 547).

149. Either party alleging error in law may deliver to one of the masters of the court a memorandum in writing, in the form contained in the Schedule (A.) to this act annexed, marked No. 10, or to the like effect, Error in law, how brought.

entitled in the court and cause, and signed by the party or his attorney, alleging that there is error in law in the record and proceedings; whereupon the master shall file such memorandum, and deliver to the party lodging the same a note of the receipt thereof; and a copy of such note, together with a statement of the grounds of error intended to be argued, may be served on the opposite party or his attorney.

One of several parties against whom a judgment has been given may proceed in error; and, if so, the memorandum should state the names of those so bringing error (s. 154, *post*, p. 132).

Error not supersedeas till service of the copy of the note and grounds of error.

150. Proceedings in error in law shall be deemed a *supersedeas* of execution from the time of the service of the copy of such note, together with the statement of the grounds of error intended to be argued, until default in putting in bail, or an affirmance of the judgment, or discontinuance of the proceedings in error, or until the proceedings in error shall be otherwise disposed of without a reversal of the judgment: provided always, that if the grounds of error shall appear to be frivolous, the court or a judge upon summons may order execution to issue.

Service of note.

Immediately, therefore, on obtaining the note from the Master, a copy of it should be made, the statement of the grounds of error annexed, and both served on the opposite party. The service may be made before the other party is entitled to sign judgment; and it is a *supersedeas* of execution, which, if issued, will be set aside (*Somerville* v. *White*, 5 East, 145; 2 Wms. Saund. 101 h).

Statement of grounds of error.

If the note contains no statement of the grounds of error intended to be argued, the opposite party may issue execution at once; but if a statement is made, however frivolous the grounds of error alleged may appear to be, the opposite party must apply for leave to issue execution.

Execution, notwithstanding error brought.

Execution may be ordered to issue if the grounds of error intended to be argued appear to be frivolous, but they must be evidently frivolous. In an action for slander, when the defendant —after having moved in arrest of judgment on two grounds, on one only of which he had obtained a rule *nisi*, which was discharged on cause being shown against it—brought error on the same grounds, the court refused leave to issue execution. "A party is entitled to a writ of error *ex debito justitiæ*; and, unless the causes of error are clearly frivolous, we cannot interfere" (*Per* Parke, B., in *Gardner* v. *Williams*, 3 Dowl. 796). When error was brought on the ground that the declaration on a bill did not aver presentment *to the acceptor*, the court allowed execution to issue (*Shelton* v. *Braithwaite*, 8 M. & W. 256); and so when the ground of error was that no promise to pay interest could be implied from the forbearance of money at defendant's request (*Nordenstrom* v. *Pitt*, 13 M. & W. 723). Execution will probably be allowed to issue on a judgment of nonsuit, should

error be brought in such a case, unless some substantial ground of error is alleged (*Box* v. *Burnett*, 1 H. Bl. 432; *Evans* v. *Swete*, 2 Bing. 326).

The court refused to allow execution to issue under this section, pending proceedings in error, it being stated that the writ of error was brought *bond fide* under the advice of counsel, and not for the purpose of delay, and it not appearing that the grounds of error were so frivolous as not to admit of argument (*Hall* v. *Conder*, 2 C. B., N. S. 49).

After the service of the documents provided by s. 149 (*ante*, p. 127), execution cannot issue on the original judgment (except by order of the court or a judge), until default in putting in bail (s. 151, *infra*), affirmance of the judgment (s. 155, *post*, p. 132), discontinuance (s. 159, *post*, p. 135), or until the proceedings in error be disposed of otherwise than by a reversal of the judgment, as by a judgment of *non pros.* (s. 153, *post*, p. 131), in which last case judgment must be signed before execution can issue (*S. Katherine's Dock Company* v. *Higgs*, 10 Q. B. 655).

Bail in error.

151. Upon any judgment hereafter to be given in any of the said Superior Courts of common law in any action, execution shall not be stayed or delayed by proceedings in error, or supersedeas thereupon, without the special order of the court or a judge, unless the person in whose name such proceedings in error be brought, with two, or, by leave of a court or a judge, more than two sufficient sureties, such as the court (wherein such judgment is or shall be given) or a judge shall allow of, shall, within four clear days after lodging the memorandum alleging error, or after the signing of the judgment, whichever shall last happen, or before execution executed, be bound unto the party for whom any such judgment is or shall be given, by recognizance to be acknowledged in the same court, in double the sum adjudged to be recovered by the said judgment, (except in case of a penalty, and in case of a penalty in double the sum really due, and double the costs,) to prosecute the proceedings in error with effect, and also to satisfy and pay (if the said judgment be affirmed, or the proceedings in error be discontinued by the plaintiff therein,) all and singular the sum or sums of money and costs adjudged or to be adjudged upon the former judgment, and all costs and damages to be also awarded for the delaying of execution, and shall give notice thereof to the defendant in error or his attorney.

In what cases.

See the cases under the old practice collected in 2 Wms. Saund. 101 m—p. The statute 6 Geo. 4, c. 96, did not apply to error in fact (*Levy* v. *Price*, 2 M. & W. 533); bringing which is so far a *supersedeas*, that execution cannot be issued without

the order of the court or a judge (*Semple* v. *Turner*, 6 M. & W. 152).

This section has been held not to apply in the case of a plaintiff alleging error (*James* v. *Cochrane*, 9 Exch. 552).

In *Reg.* v. *Ives and others, Overseers, &c.* (11 W. R. 67, Q. B., M. T. 1862), upon an application by the defendants that they, having no personal interest in the litigation, might be relieved from putting in bail in error, the Court observed that, as the only object of bail in error is to delay execution, there was no necessity for the application, and accordingly refused to comply with it.

Bail in error. Though the recognizance seems intended to be in the name of the plaintiff in error, as well as the names of the sureties, it has been held (under 3 Jac. 1, c. 8), that it is sufficient if the plaintiff procures securities to become bound for him (*Dixon* v. *Dixon*, 2 B. & P. 433; *Keane* v. *Deardon*, 8 East, 298).

When put in. The bail should be put in within four *clear* days after lodging the memorandum with the Master, or after the signing of the judgment (which is generally done at the time of taxing costs, or before execution executed). The *signing of the judgment* here intended, from which the four days are to be reckoned, is the final judgment, completed by the insertion of the amount of the taxed costs, and not what is ordinarily understood as the signing of the judgment (*Blackburn* v. *Kymer*, 5 Taunt. 672; *aliter* under s. 139 (*ante*, p. 119); *Frewen* v. *Lethbridge*, 4 H. & N. 418). If execution has issued, but is not executed, error is a *supersedeas*, so that the sheriff is a trespasser, if he proceeds after notice (*Belshaw* v. *Marshall*, 4 B. & Ad. 336). If execution is sued out after the service of the notice, and within the four days after the final judgment, it may be set aside if bail is put in (*Lane* v. *Bacchus*, 2 T. R. 44). If bail is not put in within the time allowed, execution may be issued; and if *sham* bail is put in, it may be treated as a nullity, and execution may be issued (*Ward* v. *Levi*, 1 B. & C. 268; *Sutcliffe* v. *Eldred*, 2 Dowl. 184). Money cannot, as of right, be paid into court in lieu of bail (*Collins* v. *Gwynne*, 1 M. & G. 938, note *a*).

Upon error being brought into the House of Lords, after judgment in the Exchequer Chamber, fresh bail must be put in (*Colebrooke* v. *Diggs*, 1 Str. 527).

Where a plaintiff had judgment, and the defendant brought error, and a sum of money was, in pursuant of agreement, paid into court to cover damages and costs, and in lieu of bail in error (the agreement mentioning nothing of error to the House of Lords); it was held that, upon recovering judgment in the Exchequer Chamber, the defendant was entitled to have the sum paid out to him, although the plaintiff had brought error before the House of Lords (*Castrique* v. *Imrie*, 10 C. B., N. S. 340).

The notice of bail required by the section must be given within the time limited, otherwise the defendant may sue out execution (*Attenbury* v. *Smith*, 2 D. & R. 85, n.)

For forms of notice of putting in bail, see Chitty's Forms; and as to the practice generally, 1 Chit. Arch., 12th edit. vol. i. pp. 550—586.

Staying execution. Execution may be stayed pending proceedings in error, by a special order of the court or a judge.

See as to staying proceedings against a defendant's bail (on *mesne process*) pending proceedings in error, R. G., H. T. 1853, r. 110, *post*.

152. The assignment of and joinder in error in law shall not be necessary or used, and instead thereof, a suggestion to the effect that error is alleged by the one party and denied by the other, may be entered on the judgment roll in the form contained in schedule (A.) to this act annexed, marked No. 11, or to the like effect: provided that in case the defendant in error intends to rely upon the proceeding in error being barred by lapse of time, or by release of error, or other like matter of fact, he may give four days' written notice to the plaintiff in error to assign error as heretofore, instead of entering the suggestion: and he shall, within eight days, plead thereto the bar by lapse of time, or release of error, or other like matter of fact; and thereupon such proceedings may be had as heretofore.

Suggestion instead of assignment of and joinder in error.

This suggestion is to be entered by the plaintiff in error, unless the defendant has given him four days' notice to assign errors; and in order to do so, the plaintiff in error must first enter the proceedings on the roll.

The defendant in error may give the plaintiff notice to assign errors as heretofore. (As to assignment of errors, see 2 Wms. Saund. 101, n.) The plaintiff must then assign error within ten days (s. 153, *infra*), and the defendant in error plead thereto in eight days (unless further time, in either case, is obtained); and thereupon such proceedings may be had as heretofore; see 1 Chit. Arch., 12th edit. vol. i. pp. 550—586.

Assignment of errors.

An appeal against a rule to enter a verdict, under the C. L. P. A. 1854, s. 34, *post*, may be made and argued with a suggestion under this section (*Wheelton* v. *Hardisty*, 8 E. & B. 232).

153. The roll shall be made up, and the suggestion last aforesaid entered by the plaintiff in error within ten days after the service of the note of the receipt of the memorandum alleging error, or within such other time as the court or a judge may order; and in default thereof, or of assignment of error in cases where an assignment is required, the defendant in error, his executors or administrators, shall be at liberty to sign judgment of non pros.

Roll to be made up and suggestion entered by plaintiff in error.

The suggestion is to be entered by the plaintiff in error, who may be one of several against whom judgment has been given. If one or more of several brings error, and the others decline to join, the names of the parties who decline to bring error must be suggested in the memorandum alleging error (s. 154, *post*, p. 132). Further time to suggest or assign error may be obtained as in ordinary cases.

Judgment of *non pros.* will be signed by one of the masters of the court in which the original judgment was given (1 Vict. c. 30), who will also tax the defendant's costs; upon which execution may be immediately issued (s. 155, *post*, p. 132).

Judgment must be signed before execution can be issued (*S. Katherine's Dock Company* v. *Higgs*, 10 Q. B. 655).

Error brought by one of several persons against whom judgment has been given.

154. In case error be brought upon a judgment given against several persons, and one or some only shall proceed in error, the memorandum alleging error, and the note of the receipt of such memorandum, shall state the names of the persons by whom the proceedings are taken; and in case the other persons, against whom judgment has been given, decline to join in the proceedings in error, the same may be continued, and the suggestion last aforesaid entered, stating the persons by whom the proceedings are brought, without any summons and severance, or if such other persons elect to join, then the suggestion shall state them to be, and they shall be deemed as plaintiffs in error, although not mentioned as such in the previous proceedings.

Formerly, error could be brought only in the names of *all* the parties against whom judgment was given; and notwithstanding the death of any one, he must still have been named, and his death suggested in the writ. A writ of error brought by one or more of the defendants only might have been quashed (*Walker* v. *Stokoe*, 1 Ld. Raym. 71). It was therefore brought in the names of all the parties; and if any one or more refused to appear and assign errors, they must have been summoned and have severed, after which the writ might be proceeded with (2 Wms. Saund. 101, g.) A writ of error brought by one or more of several defendants (though formerly liable to be quashed on this ground) nevertheless operated as a *supersedeas* of execution as to all the defendants; and if the defendant in error did not quash the writ, but had the judgment affirmed, he could only sue out execution for his costs in error against those who were parties to the writ (*Laroche* v. *Wasbrough*, 2 T. R. 737).

Error being brought by one or more of several defendants, the memorandum alleging error (s. 149, *ante*, p. 127) is to be in the name of such party or parties. If the remaining defendants elect to join before the suggestion is entered on the roll, the suggestion of error will be in the form given in s. 152 (*ante*, p. 131).

Judgment roll to be brought into court instead of transcript.

155. Upon such suggestion of error alleged and denied being entered, the cause may be set down for argument in the Court of Error in the manner heretofore used; and the judgment-roll shall, without any writ or return, be brought by the master into the Court of Error in the Exchequer Chamber, before the justices, or justices and barons, as the case may be, of the other two Superior Courts of Common Law, on the day of its sitting, at such time as the judges shall appoint, either in term or in vacation; or if the proceedings in error be before the high court of parlia-

ment, then before the high court of parliament, before or at the time of its sitting; and the Court of Error shall and may thereupon review the proceedings, and give judgment as they shall be advised thereon; and such proceedings and judgment, as altered or affirmed, shall be entered on the original record; and such further proceedings as may be necessary thereon shall be awarded by the court in which the original judgment was given.

See as to the practice upon transmitting the record to the House of Lords under this section, *Lane* v. *Hooper* (3 E. & B. 731).

Setting down for argument.

Where an issue in law is joined, either party may (R. G., H. T. 1853, r. 67, *post*) set down the case for argument with one of the Masters of the court in which the original judgment was given (7 Will. 4 & 1 Vict. c. 30), and forthwith give notice in writing thereof to the other party, and proceed to argument in like manner as on a demurrer. It is sufficient if the case be set down four days before the day fixed for actual argument (*S. E. Railway Company* v. *S. W. Railway Company*, 8 Exch. 367; L. J. 22, Ex. 72; *Jewell* v. *Parr*, 16 C. B. 684).

Notice of argument.

See hereon, R. G., H. T. 1853, r. 68, *post*.

Copies of proceedings to be delivered to the judges.

No entry on record of the proceedings in error is necessary before setting down the case for argument; but after judgment has been given in the Court of Error in the Exchequer Chamber, either party is at liberty to enter the proceedings in error on the judgment roll, from which execution for the costs in error is issued, as in ordinary cases.

Costs in error.

As to costs, see R. G., H. T. 1853, r. 69; and Pl. R., T. T. 1853, r. 25; and C. L. P. A. 1854, s. 43, *post*; *Fisher* v. *Bridges* (4 E. & B. 666; L. J. 24, Q. B. 165); *Marshall* v. *Jackson* (4 E. & B. 669, n.; L. J. 24, Q. B. 166, n.); *Jewell* v. *Parr* (*ubi supra*) and *Cooper* v. *Slade* (7 H. L. C. 798, n.; 1 E. & E. 335; L. J. 28, Q. B. 82). Before this rule, the taxation of the costs in error could only be reviewed by the Court of Error (*Doe* v. *Francis*, 7 Dowl. 193).

Interest.

See as to allowing interest to compensate for delay occasioned by proceedings in error, Pl. R., T. T. 1853, r. 26, *post*.

See as to amendment after judgment, *Gorton* v. *Hall, Executor of Gregory* (11 W. R. 281, Q. B., H. T. 1863). See also *Coward, Assignee of Gorton* v. *Hall, Executor of Gregory* (L. R., 2 C. P. 153).

Jurisdiction of Courts of Error over the proceedings.

156. Courts of Error shall have power to quash the proceedings in error in all cases in which error does not lie, or where they are taken against good faith, or in any case in which proceedings in error might heretofore have been quashed by such courts; and such courts shall in all respects have such jurisdiction over the proceedings as over the proceedings in error commenced by writ of error.

Quashing proceedings.

Proceedings in error may be quashed,—

1. Where error does not lie:

2. Where they are taken against good faith, as where time to plead was obtained on condition of judgment being given of the term (*Cave* v. *Massey*, 3 B. & C. 735); or the jury discharged in an action for penalties from giving a verdict, except for a single penalty, as a matter of form (*Apothecaries' Company* v. *Harrison*, 12 A. & E. 642); or time to pay obtained on a promise to settle (*Cater* v. *West*, 2 T. R. 183):

3. In any case in which such proceedings might heretofore have been quashed, as where there is an express agreement not to bring error (*Camden* v. *Edie*, 1 H. Bl. 21), or an implied agreement not to do so, as if the parties agree to be bound by the judgment of the court on demurrer (*Brown* v. *Granville*, 2 Dowl. 796; and see *Garrard* v. *Tuck*, 8 C. B. 255, where the cases are collected).

Costs are payable in all cases on quashing proceedings in error (2 Wms. Saund. 101 t).

Court of Error to have like powers with court below.

157. Courts of Error shall in all cases have power to give such judgment and award such process as the court, from which error is brought, ought to have done, without regard to the party alleging error.

As to the judgment in courts of error, see Pl. R., T. T. 1853, r. 24, *post;* Wms. Saund. 101 b b.; *Pollett* v. *Forrest* (11 Q. B. 948); and, since this enactment, *Kernot* v. *Pittis* (L. J. 23, Q. B. 34, n.); *Mardall* v. *Thellusson* (6 E. & B. 976); and *Walsh* v. *Trimmer* (L. R. 2 H. L. 220). A judgment was formerly deemed an entire thing, which could not be reversed in part, and affirmed in part (2 Wms. Saund., *supra*); and which could not, therefore, be confined to a reversal of the judgment of the court below on a demurrer, so as to allow the defendant in error to retain a verdict of nominal damages on the issues in fact (*Friar* v. *Grey*, 15 Q. B. 901).

Hitherto, a Court of Error could not award a writ of inquiry, where the damages had not been assessed; as where judgment below had been given on demurrer. The judgment in such case was interlocutory—*quod recuperet*, upon which the court below, when the transcript roll was remitted to it, awarded a writ of inquiry.

To award writ of inquiry or repleader.

A Court of Error may award a *venire de novo* (*Grant* v. *Astle*, 2 Dougl. 722); but it could not formerly award a repleader (*Gwynne* v. *Burnell*, 6 Bing. N. S. 453; 7 Cl. & F. 572).

C. L. P. A. 1854, *s.* 43.

As to error upon an award of a trial *de novo*, for matter appearing upon the record, see C. L. P. A. 1854, s. 43, *post.*

Proceedings in error in fact.

158. Either party alleging error in fact may deliver to one of the masters of the court a memorandum in writing, in the form contained in the schedule (A.) to this act annexed, marked No. 12, or to the like effect, entitled in the court and cause, and signed by the party or his attorney, alleging that there is error in fact in the proceedings, together with an affidavit of the matter of fact in which the alleged error consists; whereupon the master shall file such memorandum

and affidavit, and deliver to the party lodging the same a note of the receipt thereof; and a copy of such note and affidavit may be served on the opposite party or his attorney; and such service shall have the same effect, and the same proceedings may be had thereafter as heretofore had after the service of the rule for allowance of a writ of error in fact.

Error in fact is, where there are matters of fact not appearing on the face of the record, which, if true, would show the judgment to have been erroneous; as that the defendant in the original action, being an infant, appeared by attorney; or that a *feme*, plaintiff or defendant, was under coverture at the time of commencing the action; see *Irwin* v. *Sir G. Grey* (19 C. B., N. S. 585; L. J. 34, C. P. 313).

But a defendant, who has pleaded in bar to an action by a *feme covert*, brought in her own name by attorney as a *feme sole*, cannot afterwards assign the coverture for error (*Coan* v. *Bowles*, Carth. 124), for he might have pleaded it in an abatement.

In a case where a defendant brought error in fact, assigning infancy and his appearance by attorney, the court ordered all the proceedings subsequent to the appearance to be set aside, and the defendant to appear by guardian (*Carr* v. *Cooper*, 1 B. & S. 230; see also *Jarman* v. *Lucas*, 15 C. B., N. S. 474; L. J. 33, C. P. 108).

Where brought.

Error in fact is brought in the court in which the judgment alleged to be erroneous is given. It does not lie either in the Exchequer Chamber or the House of Lords; but it does lie in the Queen's Bench, on a judgment of the Common Pleas (*Castledine* v. *Mundy*, 4 B. & Ad. 90, 97): and a wrong decision on an allegation of error in fact may so appear on the record as to constitute error in law and so become appealable (*Irwin* v. *Sir G. Grey*, L. R. 1 C. P. 171, in Exch. Ch. and L. R. 2 H. L. 20).

Bail is not required in bringing error in fact, which is only so far a *supersedeas* that execution cannot issue without a special order of the court or a judge (*Semple* v. *Turner*, 6 M. & W. 152).

Error in fact is now a step in the cause (s. 148, *ante*, p. 127); and is brought by lodging a memorandum of error with the Master.

The memorandum must be accompanied by an affidavit, stating the matter of fact in which the alleged error consists (see *Birch* v. *Trist*, 8 East, 415).

The service of the copy of the Master's note and affidavit, is to have the same effect as the service of the rule for allowance of a writ of error in fact had under the former practice. The plaintiff in error must assign error, the defendant must plead, and the fact must be tried as in an ordinary action; see R. G., H. T. 1853, rr. 64, 65, 66, *post*); Chit. Arch. 12th ed. vol. i. pp. 586—590.

See as to reversing judgment by plaintiff in error, after verdict in his favour in error, *Jackson* v. *Marshall* (L. J. 24, Q. B. 143, Bail Court).

Plaintiff may discontinue proceedings in error.

159. The plaintiff in error, whether in fact or law shall be at liberty to discontinue his proceedings by giving to the defendant in error a notice, headed in the court and cause, and signed by the plaintiff in

error or his attorney, stating that he discontinues such proceedings; and thereupon the defendant in error may sign judgment for the costs of, and occasioned by the proceedings in error, and may proceed upon the judgment on which the error was brought.

See as to costs, note to s. 155 (*ante*, p. 133).

Defendant may confess error, and consent to reversal of judgment.

160. The defendant in error, whether in fact or law, shall be at liberty to confess error, and consent to the reversal of the judgment, by giving to the plaintiff in error a notice, headed in the court and cause, and signed by the defendant in error or his attorney, stating that he confesses the error, and consents to the reversal of the judgment; and thereupon the plaintiff in error shall be entitled to and may forthwith sign a judgment of reversal.

As to costs, where judgment is reversed, see 2 Wms. Saund. 101 gg; and rules and cases cited in note to s. 155 (*ante*, p. 133). As to the writ of restitution, where execution has been done, see 2 Wms. Saund. *ubi sup.* A more summary redress than the writ of restitution may be had by the party injured applying to the court to have restored to him all that he has lost thereby (Chit. Arch. 12th ed. vol. i. pp. 582—586).

Death of plaintiff in error no abatement.

161. The death of a plaintiff in error after service of the note of the receipt of the memorandum alleging error, with a statement of the grounds of error, shall not cause the proceedings to abate, but they may be continued as hereinafter mentioned.

The death of a plaintiff in error formerly abated the proceedings [as did the death of one of several plaintiffs previously to the statute 8 & 9 Will. 3, c. 11, *Clarke* v. *Rippon* (1 B. & A. 586)], if the death took place *before* errors assigned. There was no abatement *after* errors assigned; for the defendant might then join in error, and so proceed to an affirmance of the judgment, and then revive it against the executors or administrators (2 Wms. Saund. 104).

Providing for death of one of several plaintiffs in error.

162. In case of the death of one of several plaintiffs in error, a suggestion may be made of the death, which suggestion shall not be traversable, but shall only be subject to be set aside if untrue, and the proceedings may be thereupon continued at the suit of, and against the surviving plaintiff in error, as if he were the sole plaintiff.

Proceedings upon death of sole plaintiff or of all the plaintiffs in error.

163. In case of the death of a sole plaintiff or of several plaintiffs in error, the legal representative of such plaintiff or of the surviving plaintiff may, by leave of the court or a judge, enter a suggestion of the death, and that he is such legal representative,

which suggestion shall not be traversable, but shall only be subject to be set aside if untrue, and the proceedings may thereupon be continued at the suit of and against such legal representative as the plaintiff in error; and if no such suggestion shall be made, the defendant in error may proceed to an affirmance of the judgment according to the practice of the court, or take such other proceedings thereupon as he may be entitled to.

If a sole plaintiff, or sole surviving plaintiff in error dies, and the legal representative fails to enter a suggestion of the death, the defendant may go on to an affirmance of the judgment, in the same way as he would formerly have done had the plaintiff in error died *after* errors assigned. The defendant in error will be obliged to revive the judgment against the representatives in order to have execution (2 Wms. Saund. 101 t).

On the affirmance of the judgment the legal representative is not liable for any costs incurred prior to the entry of the suggestion on the roll (*Parker* v. *Tootal*, L. R. 1 Ex. 41, 115).

Death of defendant in error no abatement.

164. The death of a defendant in error shall not cause the proceedings to abate, but they may be continued as hereinafter mentioned.

A writ of error in no case abated by the death of the defendant in error (2 Wms. Saund. 101 t); but this enactment may be necessary in consequence of the previous enactment (s. 148, *ante*, p. 127), making "error" a step in the cause.

Proceedings upon death of one of several defendants in error.

165. In case of the death of one of several defendants in error, a suggestion may be made of the death, which suggestion shall not be traversable, but only be subject to be set aside if untrue, and the proceedings may be continued against the surviving defendant.

This is according to the former practice. See a form of suggestion, Lill. Ent. 217.

Proceedings upon death of sole defendant or of all the defendants in error.

166. In case of the death of a sole defendant or of all the defendants in error, the plaintiff in error may proceed upon giving ten days' notice of the proceedings in error, and of his intention to continue the same, to the representatives of the deceased defendants, or if no such notice can be given, then, by leave of the court or a judge, upon giving such notice to the parties interested as he or they may direct.

A writ of error did not abate by the death of the defendant in error. If he died before assignment of errors, and the plaintiff failed to assign errors, judgment of *non pros.* might have been signed, though the representatives had not been made parties to the same (*S. Katherine's Dock Company* v. *Higgs*, 10 Q. B. 655). If the defendant died *after* assignment of errors, the executors might proceed to an affirmance as if the defendant were living,

and then revive the judgment to get execution. A writ of *scire facias ad audiendum errores* was necessary (2 Wms. Saund. 101 a); this writ is still preserved (s. 132, *ante*, p. 114); but this section renders it unnecessary in most cases.

Marriage not to abate proceedings in error.

167. The marriage of a woman, plaintiff or defendant in error, shall not abate the proceedings in error, but the same may be continued in like manner as hereinbefore provided with reference to the continuance of an action after marriage.

See s. 141. n. (*ante*, p. 122).

EJECTMENT.*

And with respect to the action of ejectment, be it enacted as follows:

Ejectment to be brought by writ.

168. Instead of the present proceeding by ejectment, a writ shall be issued, directed to the persons in possession by name, and to all persons entitled to defend the possession of the property claimed, which property shall be described in the writ with reasonable certainty.

The writ by which the action is to be commenced is to be directed to the persons in possession, that is, in actual possession of the premises.

Distinction between actual and vacant possession.

A distinction must be here drawn between what constitutes, in the eye of the law an actual, and what a vacant possession. Thus land illegally converted into a road, by trustees under an act of parliament, is not in their possession, so as to make them tenants in possession (*Doe* d. *White* v. *Roe*, 8 Dowl. 71).

Vacant possession.

Where the person had removed from the premises, but had left beer in the cellar, it was held that the plaintiff or claimant could not proceed as on a vacant possession (*Savage* v. *Dent*, 2 Str. 1064). So if hay is left in a barn (*Ib.*); and if the residence of the tenant of land, where there is no house, is known, he must be served (*Ib.*). But if the tenant has locked up and quitted the house, the plaintiff may proceed as on a vacant possession (*Doe* d. *Portarlington* v. *Roe*, 4 B. & C. 259). So if the house has been pulled down (*Doe* d. *Norman* v. *Roe*, 2 Dowl. 399, 428); and so if

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* It may be well here to observe, that under the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 11, which comes into operation on the 1st of January, 1868, it is enacted that all actions of ejectment, where neither the rent nor annual value of the lands exceeds 20*l.*, may be brought in the County Court of the district where the lands are situate. By s. 12 it is provided, "that the defendant in any such action of ejectment, or his landlord, may, within one month from the day of service of the writ, apply to a judge at chambers for a summons to the plaintiff to show cause why such action should not be tried in one of the superior courts on the ground that the title to lands or hereditaments of greater annual value than twenty pounds will be affected by the decision in such action; and on the hearing of such summons the judge, if satisfied that the title to other lands would be so affected, may order such action to be tried in one of the superior courts, and thereupon all proceedings in the County Court in such action shall be discontinued.

the premises are untenantable, and there is no property in them, —unfinished houses, for instance (*Doe* d. *Schovell* v. *Roe*, 3 Dowl. 691). But the possession in such cases must be clearly vacant; it must appear that there are no tenants in possession (*Doe* d. *Burrowes* v. *Roe*, 7 Dowl. 326). If some of the houses only are vacant, and if they are included in the lease with others, the claimant cannot proceed as on a vacant possession (*Doe* d. *Timothy* v. *Roe*, 8 Scott, 126). The court, in such circumstances, granted a rule *nisi*, and directed service to be effected by sticking up copies of the declaration and notice, and also by serving them on the parties who were shown to be interested (*Doe* d. *Chippendale* v. *Roe*, 7 C. B. 125).

In a case of vacant possession, service of a writ of ejectment addressed "to the assignees and personal representatives of A. B. deceased," by posting copies upon the premises, was held good (*Harrington* v. *Bytham*, 2 C. L. R. 1033; Ex. E. T. 1864).

Names of tenants in possession.

Provided the writ is served on the *persons* in possession, an absolutely correct statement of the *names* will not be of importance (*Doe* d. *Frost* v. *Roe*, 3 Dowl. 563): and see *Doe* d. *Foulkes* v. *Roe*, (2 Dowl. 567), where the tenant was called *Jacob* in the notice of declaration, instead of *Sarah*. In *Doe* d. *Peach* v. *Roe* (6 Dowl. 62), in ejectment against several tenants, Tindal, C. J., said, that each tenant in possession should be rightly named in his own notice. Notices addressed to "Mrs. Martin" and "Mrs. Gough" have been, however, held sufficient, it being sworn that they were personally served, and were the tenants in actual possession, and that their Christian names were not known (*Doe* d. *Smith* v. *Roe*, 6 Dowl. 629). The cases are collected in Adams on Ejectment, p. 183.

Description of premises.

Want of the "reasonable certainty" required in the description of the property will not nullify the writ; but it will afford ground for an application for better particulars (s. 175, *post*). As to what formerly constituted a sufficient description of the property, see Adams on Ejectment, p. 16; and as to obtaining better particulars, see *Doe* d. *Saxton* v. *Turner* (11 C. B. 896).

It would seem that a more full, and possibly a less fanciful, description of the property should now be given, than that given in the former declaration in ejectment.

Form and duration of writ of ejectment.

169. The writ shall state the names of all the persons in whom the title is alleged to be, and command the persons, to whom it is directed, to appear, within sixteen days after* service thereof, in the court from which it is issued, to defend the possession of the property sued for, or such part thereof as they may think fit, and it shall contain a notice that in default of appearance they will be turned out of possession; and

* Judgment cannot therefore be signed for default of appearance, until the day after the sixteen days for appearance have elapsed; and, therefore, when the writ was served on the 19th of February, 1858, a judgment signed on the 7th of March following was set aside (*Stanton* v. *Brittle*, 1 F. & F. 468, per Williams, J., at chambers).

the writ shall bear teste of the day on which it is issued, and shall be in force for three months, and shall be in the form contained in the Schedule (A.) to this act annexed, marked No. 13, or to the like effect; and the name and abode of the attorney issuing the same, or, if no attorney, the name and residence of the party, shall be endorsed thereon, in like manner as hereinbefore enacted with reference to the indorsements on a writ of summons in a personal action; and the same proceedings may be had to ascertain whether the writ was issued by the authority of the attorney whose name was indorsed thereon, and who and what the claimants are, and their abode, and as to staying the proceedings upon writs issued without authority, as in the case of writs in personal actions.

The observations which have been made on the writ of summons in personal actions, in regard to the names of the parties (*ante*, p. 2), the date of the writ (p. 4), the name and abode of the attorney (p. 4), and the residence of the plaintiff, if he sues in person (p. 4), are applicable to the names, date and indorsements on the writ of ejectment; and likewise to the proceedings to ascertain if the writ was issued by the authority of the attorney whose name is indorsed (p. 5).

The writ is sued out and sealed at the office of the court on delivering a *præcipe*, in the same way as an ordinary writ of summons (*ante*, p. 3).

Venue in ejectment. The action of ejectment is *local*. The county where the premises are situate must be correctly stated. If at the trial they appear to be in a different county, the plaintiff may be nonsuited, though an error of this kind may be amended before trial (s. 20, *ante*, p. 28). When the premises are described as lying in a parish, hamlet, &c. the description must be correct, though an error (in the parish, for instance) will be amended at the trial, if the defendant has not been misled (*Doe* d. *Marriott* v. *Edwards*, 6 C. & P. 208).

Names of claimants. The writ must state the names of *all* the persons in whom the title is alleged to be. Where formerly there was any doubt as to the persons in whom was the legal estate, it was usual to lay several demises in the names of these different parties in the declaration, so that the claimant might rely upon any one demise, under which he could prove his title. In such a case instead of several demises, the writ now contains the names of the different parties. (See C. L. P. A. 1860, s. 19, *post*).

Tenants in common may issue a joint writ to recover the property to which they are entitled in common (*Elliss* v. *Elliss*, E. B. & E. 81; L. J. 27, Q. B. 316).

Quære, whether service upon a tenant in possession, who is not named in the writ, is irregular (*Thompson* v. *Slade*, L. J. 25, Ex. 306).

Service of writ of ejectment.

170. The writ shall be served in the same manner as an ejectment has heretofore been served, or in such manner as the court or a judge shall order, and in case

of vacant possession, by posting a copy thereof upon the door of the dwelling-house or other conspicuous part of the property.

The service of the writ of ejectment, by analogy to the service of the declaration and notice under the old practice, must be effected by the delivery of a copy of the writ (the original writ being exhibited, if required, at the same time) to the tenant himself, or to his wife, or to some member of his family, in which latter case it must be shown that the writ came to his knowledge.

It was always usual for the person who served it, to read over and explain the nature and meaning of the declaration to the person upon whom it was served; a proceeding far from unnecessary, when it is recollected what the declaration by John Doe against Richard Roe, and Richard Roe's friendly notice to the tenant in possession, respectively contained. Accordingly, this explanation was not dispensed with, except in those cases in which the person to be served dispensed with or rejected the explanation offered (see cases *supra*), or was an attorney, who would, of course, understand the proceeding without explanation. The necessity of explanation under the present practice has not been formally disavowed by the courts; and in the only reported case wherein the question was raised, it was left undetermined (*Edwards* v. *Griffith*, 15 C. B. 397). Although the present writ explains itself, and the R. G., H. T. 1853, r. 112, *post*, seems to ignore the necessity of further explanation, it may be as well, as the statute is express in its terms, for every person serving a writ in ejectment to read it over and explain its nature to the person to be served, and to state his having done so in the affidavit of service, when such affidavit is made.

Service of writ, how effected.

As many copies as there are persons named in the writ must be made, and a copy served on each person so named. Acceptance of the copy of the writ by the person to be served is not necessary. It is enough that the copy is tendered, and its nature stated (*Doe* d. *Courthorpe* v. *Roe*, 2 Dowl. 441); but the nature of the proceeding need not be stated, if the party, by his acts, dispenses with or prevents it (*Doe* d. *George* v. *Roe*, 3 Dowl. 541).

On tenant.

Personal service on the tenant in possession himself, may be made on the premises or elsewhere (*Savage* v. *Dent*, 2 Str. 1064); and either within the jurisdiction of the court, or abroad (*Doe* d. *Daniel* v. *Woodruffe*, 7 Dowl. 494).

The service must be on the person in actual possession, to whom the writ is directed; that is, on the sub-tenant (for instance), in ejectment by landlord against tenant, where the premises have been sub-let (*Doe* d. *Darlington* v. *Cock*, 4 B. & C. 259).

Showing the writ to the tenant *on* the premises, and telling him the nature of it, is good service if the tenant goes away and refuses to listen (*Doe* d. *Roberts* v. *Roe*, 6 Sc. N. C. 833). So if the writ is shown to the tenant *off* the premises, and attempts are made to serve him with a copy and to explain the matter, and a copy is afterwards left for him on the premises with a servant, it is good service (*Doe* d. *Hope* v. *Roe*, 3 C. B. 771). So if the person serving the writ, after stating his business, is turned out of the house when he is attempting to serve the writ, a copy thrust under the door will be good service (*Doe* d. *Frith* v. *Roe*, 3 Dowl. 569). So if the other parties eject the process-server from the

presence of the tenant in possession, and prevent the complete service (*Doe* d. *Mann* v. *Roe*, 11 M. & W. 77).

On tenant's wife on the premises.

Service on the wife of the tenant, either on the premises (*Goodright* v. *Thrustout*, 2 Wm. Bl. 800) or at the husband's house, is sufficient (*Doe* d. *Graef* v. *Roe*, 6 Dowl. 456). The reason that it is necessary to state in the affidavit that service on the wife was at the husband's house, is to show that they were living together as man and wife (*Doe* d. *Morland* v. *Baylis*, 6 T. R. 765). It is enough if the woman on the premises stated herself to be the wife of the tenant, and the person serving the writ swears that he believes such statement to be true (*Doe* d. *Grange* v. *Roe*, 1 Dowl. N. S. 274). An affidavit of service on the wife should state (if possible) that the wife was living with the husband at the time (*Doe* d. *Boullot* v. *Roe*, 7 Dowl. 463).

On child, servant or member of family of tenant.

Service of the declaration and notice might, by the former practice, have been effected by leaving the copy with a child, servant, or other member of the family of the tenant; but it was necessary that the service effected in this manner should be on the premises themselves; and that the fact of the declaration and notice having come to his hands before the term should have been subsequently acknowledged by the tenant himself (*Doe* d. *Ginger* v. *Roe*, 9 Dowl. 336; *Doe* d. *Royle* v. *Roe*, 5 C. B. 256, 258, where the more recent cases are collected; *Doe* d. *Watson* v. *Roe*, 5 C. B. 521). If an acknowledgment to that effect had been made by the tenant's wife only, it afforded ground for a rule nisi (*Doe* d. *Chaffey* v. *Roe*, 9 Dowl. 100; and see *Doe* d. *Royle* v. *Roe*, *ubi supra*).

Bankruptcy of tenant.

Where the tenant had become bankrupt, a service on the messenger in possession of the premises, and on the official assignee, has been held insufficient (*Doe* d. *Baring* v. *Roe*, 6 Dowl. 456).

Death of tenant.

Where the tenant had died, a service on the widow in possession, who was administratrix, was held sufficient (*Doe* d. *Pamphilon* v. *Roe*, 1 Dowl. N. S. 186). Where a servant of the deceased remains in possession, the claimant ought to endeavour to obtain possession; and if the servant resists, he may be treated as tenant (*Doe* d. *Atkins* v. *Roe*, 2 Chit. 179).

Where tenant a lunatic.

If the tenant is a lunatic, the service should be on his committee, if he has one, and not on a servant (*Anon.* Lofft. 461). If there is no committee, service on the lunatic is sufficient (*Doe* d. *Gibbard* v. *Roe*, 9 Dowl. 844). Service on a lunatic's daughter, who conducted the lunatic's business, was held insufficient (*Doe* d. *Brown* v. *Roe*, 6 Dowl. 270).

Service on joint tenants.

Service on one of several joint tenants is sufficient (*Doe* d. *Clothier* v. *Roe*, 6 Dowl. 291); so is service on one of several partners (*Doe* d. *Overton* v. *Roe*, 9 Dowl. 1039; *Doe* d. *Bennett* v. *Roe*, 7 C. B. 127).

On several tenants.

If there are several tenants in possession, a copy of the writ ought to be served on each (B. N. P. 98; and *Doe* v. *Cook*, 4 B. & C. 259). If the service is on the original tenant, where there are several sub-tenants, and he appears and defends, he cannot afterwards object that the sub-tenants, and not himself, were in

possession (*Roe* v. *Wigge*, 2 N. R. 330). Service on a landlord, sub-letting to weekly tenants, and occupying no part of the premises himself, is not sufficient (*Doe* d. *Hubbard* v. *Roe*, 2 Har. & Woll. 333); *aliter* if the premises have been for some time unoccupied (*Doe* d. *Hayne* v. *Roe*, 2 Will. Wol. & Dav. 72).

On public companies.

As to service on public companies, see the observations as to the service of writs of summons (*ante*, pp. 11, 14, 15), *Doe* d. *Bromley* v. *Roe* (8 Dowl. 858), and *Doe* d. *Bayes* v. *Roe* (16 M. & W. 98).

On churchwardens, &c.

Service on churchwardens must be on all the churchwardens (*Doe* d. *Weeks* v. *Roe*, 5 Dowl. 405). Service on the surviving lessees, and on the sextoness of a dissenting chapel has been held sufficient (*Doe* d. *Kirschner* v. *Roe*, 7 Dowl. 97); and see *Doe* d. *Dickens* v. *Roe*, 7 Dowl. 121); and *Doe* d. *Smith* v. *Roe* (8 Dowl. 509), where service on the minister and one trustee as to the chapel, and on the master as to the school, and sticking up a copy of the declaration and notice upon the doors of each building, was held sufficient.

Appearance of persons named in the writ.

171. The persons named as defendants in such writ or either of them, shall be allowed to appear within the time appointed.

The appearance of the tenant or tenants in possession to the writ should be in the form prescribed by s. 31 (*ante*, p. 36).

An appearance by a landlord must be according to s. 173 (*post*, p. 145). The appearance ought to be entered within the sixteen days under s. 169 (*ante*, p. 139); an appearance may, of course, be entered after the expiration of that time, if judgment has not been signed. It may be doubtful how far the provisions of s. 29 (*ante*, p. 35) apply to writs of ejectment; although these writs are now practically writs of summons in ejectment. As to limiting the defence to a part of the premises claimed, see s. 174 (*post*, p. 146).

Appearance of persons not named.

172. Any other person not named in such writ shall, by leave of the court or a judge, be allowed to appear and defend, on filing an affidavit showing that he is in possession of the land either by himself or his tenant.

Who may appear and defend.

This section is more general than 11 Geo. 2, c. 19, s. 13; which permitted the landlord to make himself defendant in ejectment. The word "landlord" in that section has been construed to include all persons claiming title consistent with the possession of the occupier. Thus the court permitted a mortgagee out of possession to be made defendant (*Doe* d. *Tilyard* v. *Cooper*, 8 T. R. 645); but in such a case a mortgagee must show that he has a *bonâ fide* interest in the result (*Doe* d. *Pearson* v. *Roe*, 6 Bing. 613). An heir who had never been in possession (*Doe* d. *Hebblethwaite* v. *Roe*, 3 T. R. 783, n.), and a devisee in trust in the same position (*Lovelock* v. *Dancaster*, 4 T. R. 122), were admitted to defend; so under this section, the sub-lessee of three private boxes in a theatre was allowed to come in and defend, to the

extent of his interest, an ejectment by the lessor against the lessee of the theatre for forfeiture (*Croft* v. *Lumley, Ex parte Lord Ward*, 4 E. & B. 608); but a *cestui que trust*, who had never been in possession, was not admitted (*Lovelock* v. *Dancaster*, 3 T. R. 783) under the previous enactment. And under this section, an *elegit* creditor of a lessee who had executed the elegit, but who had not had actual possession delivered under a writ of possession, is not entitled to appear and defend an ejectment by the lessor against the lessee for forfeiture (*Croft* v. *Lumley, Ex parte Hughes*, 4 E. & B. 614; *Thompson* v. *Tomkinson*, 11 Exch. 442). And a mere remainderman has been refused leave to appear upon the ground that *possession*, either by himself or by his tenant, must be shown by an applicant under this section (*Whitworth* v. *Humphries*, 5 H. & N. 185).

Where a person claims in opposition to the title of the tenant in possession, it would be unjust to make him a co-defendant; the defences might clash (*Driver* v. *Lawrence*, 2 Wm. Bl. 1259). No person claiming adversely will be admitted to defend (*Doe* d. *Horton* v. *Rys*, 2 Y. & J. 88); and if admitted, the claimant may apply (under s. 176, *post*, p. 146) to strike out the appearance. But if the claimant does not do so, and the party continues on the record, he will not be allowed to set up such inconsistent title as a defence at the trial (*Doe* d. *Mee* v. *Litherland*, 4 A. & E. 784; *Doe* v. *Challis*, (17 Q. B. 166; L. J. 20, Q. B. 478).

Landlord. It is not necessary for the landlord to become a defendant in order to make his title admissible in evidence. He may, with the tenant's consent, defend in the tenant's name. In an action so defended, where the claimant, having knowledge thereof, obtained from the tenant a *retraxit* of the plea, and a *cognovit* of the action, the court set aside the judgment (*Doe* d. *Locke* v. *Franklin*, 7 Taunt. 9). See as to liability for costs, where ejectment is defended in the name of tenant by strangers, *Hutchinson* v. *Greenwood* (4 E. & B. 324; L. J. 24, Q. B. 2).

See further, as to the liability of strangers claiming or defending to costs, note to sect. 221 (*post*, p. 173).

Affidavit for leave to appear. The affidavit of a person applying for leave to appear and defend must show that he is in possession of the premises. In an action brought to enforce an *elegit*, a corporation was not permitted to defend without admitting themselves to be in possession; although the defence was, that the premises were not possessed by them for any but public purposes, and therefore were not liable to execution (*Doe* d. *Parr* v. *Roe*, 1 Q. B. 700; see also *Doe* v. *Challis*; *Croft* v. *Lumley, Ex parte Hughes, ubi supra*).

Where the person applying for leave to appear and defend resides abroad, he may be required to give security for costs (*Doe* d. *Hudson* v. *Jameson*, 4 Man. & R. 470); but it would seem that if the application be made in due time, terms cannot now be imposed upon a landlord who shows himself to be in possession by his tenant (*Butler* v. *Meredith*, 11 Exch. 85).

When to apply for leave to appear. The application for leave to appear and defend should be made as soon as the person has notice of the writ, so that an appearance may be entered within the sixteen days allowed for doing so, and, if possible, before judgment. Further time to appear, and a stay of proceedings, may possibly be obtained from a judge at chambers, should either be necessary. If judgment has been

signed (s. 177, *post*, p. 147), the application must also be to set aside the judgment.

Form and notice of appearance.

As to form, and notice of appearance by a person let in to defend, see R. G., H. T. 1853, r. 113, *post*.

The court will not allow the possession to be changed where there has been no trial or opportunity of trying the cause; and therefore will set aside a regular judgment, and admit the landlord to defend, if the tenant has not given him notice (*Doe* d. *Troughton* v. *Roe*, 4 Burr. 1996: and see *Dobbs* v. *Passer*, 2 Str. 975). And after judgment signed and execution executed, a judge at chambers may order the judgment and subsequent proceedings to be set aside on payment of costs, and a party to be let in to defend as tenant; as where the attorney, having been duly instructed, inadvertently neglected to appear in time (*Doe* d. *Mullarky* v. *Roe*, 11 A. & E. 333). But as a general rule, the court will not interfere after execution executed (*Goodtitle* v. *Badtitle*, 4 Taunt. 850; *Doe* d. *Thompson* v. *Roe*, 4 Dowl. 115); unless, indeed, in the case of inadvertence, as in *Doe* d. *Mullarky* v. *Roe*, *ubi supra*, or in *Doe* d. *Butler* v. *Roe* (2 Har. & W. 130), where, after an action for mesne profits had been commenced, the court set aside all the proceedings in the ejectment, it being shown that the landlord had never got the notices, his wife having locked them up, thinking that they related to a former action and were of no importance. In the case of collusion between the tenant and the claimant, the court will always interfere. (*Goodtitle* v. *Badtitle*, *ubi supra*; *Doe* d. *Grocers' Company* v. *Roe*, 5 Taunt. 205). When the court sets aside a regular judgment, it is generally on payment of costs.

If a judgment is signed irregularly, the judgment and execution will be set aside, and generally with costs (*Goodtitle* v. *Badtitle*, 9 Dowl. 1009); and the court may impose the terms on the defendant that he shall bring no action (*Adlam* v. *Noble*, 9 Dowl. 322).

Restitution.

When a judgment, under which possession has been delivered, is set aside, the proper course to obtain restitution is to apply to the court in the first instance for a rule requiring possession to be restored, which will be enforced by attachment, if necessary (*Corbett* v. *Nicholls*, 2 L. M. & P. 87). If this is ineffectual (as where the claimant has absconded), a writ of restitution may then be issued (*Doe* d. *Whittington* v. *Hards*, L. J. 20, Q. B. 406).

Appearance and defence by landlord.

173. Any person appearing to defend as landlord in respect of property, whereof he is in possession only by his tenant, shall state in his appearance that he appears as landlord; and such person shall be at liberty to set up any defence which a landlord appearing in an action of ejectment has heretofore been allowed to set up, and no other.

See R. G., H. T. 1853, r. 113, *post*, as to entry of appearance by landlord where he is not named in the writ.

A landlord admitted to defend, under the former practice could not avail himself of any defence which the tenant was precluded from setting up (*Doe* d. *Willis* v. *Buckmore*, 9 A. & E. 662).

Nor could he avail himself of every defence that the tenant had; thus, he could not set up the want of a notice to quit to the occupier (*Doe* d. *Davis* v. *Creed*, 5 Bing. 327). The tenant will not, by a landlord being joined, be precluded from setting up any defence which he may have as tenant in possession (*Doe* d. *Wawn* v. *Horn*, 3 M. & W. 333).

Notice to defend for part only.

174. Any person appearing to such writ shall be at liberty to limit his defence to a part only of the property mentioned in the writ, describing that part with reasonable certainty in a notice entitled in the court and cause, and signed by the party appearing or his attorney; such notice to be served within four days after appearance upon the attorney whose name is indorsed on the writ, if any, and if none, then to be filed in the Master's office; and an appearance without such notice confining the defence to part, shall be deemed an appearance to defend for the whole.

See as to former practice, *Doe* d. *Lloyd* v. *Roe* (15 M. & W. 431).

Want of certainty cured by particulars.

175. Want of "reasonable certainty" in the description of the property, or part of it, in the writ or notice, shall not nullify them, but shall only be ground for an application to a judge for better particulars of the land claimed or defended, which a judge shall have power to give in all cases.

An application for better particulars may be made before an appearance has been entered (*Doe* d. *Vernon* v. *Roe*, 7 A. & E. 14; and see *Doe* d. *Roberts* v. *Roe*, 2 D. & L. 673, where an order was made for particulars under such circumstances). Although it is laid down in the books of practice that this application can only be made after an appearance has been entered, it seems but reasonable that a defendant should know what property the claimant seeks to recover, before he is called upon to state that he defends the possession of it—a possession he may not have at all; but see *Doe* d. *Saxton* v. *Turner* (11 C. B. 896). An order for better particulars is not a stay of proceedings, unless a stay of proceedings is made part of the order (*Doe* d. *Roberts* v. *Roe*, *ubi supra*).

It is the duty of the claimant to annex to the record for trial copies of the particulars (if any) that have been furnished (s. 180, *post*, p. 148).

Defence by persons not in possession.

176. The court or a judge shall have power to strike out or confine appearances and defences set up by persons not in possession by themselves or their tenants.

This is a power which the court always exercised (s. 172, *ante*, p. 143) over the proceedings in ejectment. See *Doe* d. *Lloyd* v. *Roe* (*ubi supra*).

Judgment for default of appearance or defence.

177. In case no appearance shall be entered into within the time appointed, or if an appearance be entered, but the defence be limited to part only, the plaintiffs shall be at liberty to sign a judgment that the person whose title is asserted in the writ shall recover possession of the land, or of the part thereof to which the defence does not apply; which judgment, if for all, may be in the form contained in the Schedule (A.) to this act annexed, marked No. 14, or to the like effect, and if for part may be in the form contained in the Schedule (A.) to this act annexed, marked No 15, or to the like effect.

See R. G., H. T. 1853, r. 112, *post*.

For part of the premises claimed.

If an appearance is entered for a defendant, but a notice limiting the defence to part only of the premises is given under s. 174 (*ante*, p. 146), then the claimant may sign a judgment for that part of the premises to which the notice does not apply.

See as to sufficiency of service of writ, *Harrington* v. *Bytham*, (2 C. L. R. 1033; Ex. E. T. 1864).

No formal judgment, it would appear, need be entered up. The claimant may sign judgment and issue execution on an *incipitur* under s. 206 (*post*, p. 159).

No costs are recoverable by a judgment under this section (Gray on Costs, p. 196); but they may be recovered in an action for mesne profits (~~*Smith* v. *Farr*, 9 Bingh. 307~~).

Sect. 58 (*ante*, p. 59) does not apply in ejectment (*Scope* v. *Paddison*, 6 H. & N. 641; L. J. 30, Ex. 244).

Issue, how made up.

178. In case an appearance shall be entered, an issue may at once be made up, without any pleadings,* by the claimants or their attorney, setting forth the writ, and stating the fact of the appearance, with its date, and the notice limiting the defence, if any, of each of the persons appearing, so that it may appear for what defence is made, and directing the sheriff to summon a jury; and such issue, in case defence is made for the whole, may be in the form contained in Schedule (A.) to this act annexed, marked No. 16, or to the like effect, and in case defence is made for part, may be in the form contained in the Schedule (A.) to this act annexed, marked No. 15, or to the like effect.

Venue.

The venue in ejectment is local. It must therefore be laid in the county where the lands are situate. If it is correctly stated in the writ, an error in this respect in the margin of the issue is unimportant (*Doe* d. *Goodwin* v. *Roe*, 3 Dowl. 323).

The venue may be changed after issue joined (s. 182, *post*, p. 149).

* As there are no pleadings, an equitable defence cannot be set up in ejectment under C. L. P. A. 1854, s. 83, *post* (*Neave* v. *Avery*, 16 C. B. 328; L. J. 24, C. P. 207).

Special case may be stated.

179. By consent of the parties, and by leave of a judge, a special case may be stated according to the practice heretofore used.

This section enables the claimant and defendant to state a special case for the opinion of the court under the 3 & 4 Will. 4, c. 42, s. 25. It may be doubted whether the provisions of ss. 42 and 46 (*ante*, pp. 49, 50) extend to ejectment (s. 227, *post*, p. 181).

See special cases stated in *Doe* d. *Kimber* v. *Cafe* (7 Exch. 675); *O'Toole* v. *Brown* (3 E. & B. 572; L. J. 23, Q. B. 282).

Trial of issue.

180. The claimants may, if no special case be agreed to, proceed to trial upon the issue, in the same manner as in other actions; and the particulars of the claim and defence, if any, or copies thereof, shall be annexed to the record by the claimants; and the question at the trial shall, except in the cases hereafter mentioned, be, whether the statement in the writ of the title of the claimants is true or false, and, if true, then which of the claimants is entitled, and whether to the whole or part, and if to part, then to which part of the property in question; and the entry of the verdict may be made in the form contained in the Schedule (A.) to this act annexed, marked No. 17, or to the like effect, with such modifications as may be necessary to meet the facts.

The claimant must give the same notice of trial or of countermand, and adopt the same proceedings, in order to try by a special jury, as in personal actions.

Plea distributable.

The particulars of the "claim" to be annexed to the record by the claimant seem to be the "better particulars," if any, furnished under s. 175 (*ante*, p. 146).

By particulars of the "defence," again to be similarly annexed to the record, must be meant a notice limiting the defence, given under s. 174 (*ante*, p. 146).

The plea of not guilty in ejectment was formerly distributable, and the defendant was entitled to a verdict as to any part of the premises sought to be recovered, to which the claimant failed to prove a title (*Doe* d. *Bowman* v. *Lewis*, 13 M. & W. 241; *Doe* d. *Hellyer* v. *King*, 2 L. M. & P. 493; and see *Alcock* v. *Wilshaw*, 2 E. & E. 633; L. J. 29, Q. B. 143).

Tenants in common may recover under a joint writ the property to which they are entitled as tenants in common (*Elliss* v. *Elliss*, E. B. & E. 81; L. J. 27, Q. B. 316); they could not formerly have recovered on a joint demise in ejectment (*Doe* d. *Poole* v. *Errington*, 1 A. & E. 750).

Where some of many tenants in common are plaintiffs in ejectment, they can only recover, even as against a stranger, to the extent of their undivided interests; and it rests upon them to define the extent of such interests, and in the absence of such definition they will be nonsuited (*Doe* d. *Hellyer* v. *King*, 6 Exch. 791).

Costs of issues.

Under the former practice the R. G., H. T. 2 Will. 4. r. 74, provided that no costs should be allowed on taxation to a plain-

tiff upon any issues upon which he has not succeeded, and the costs of all issues found for the defendant were to be deducted from the plaintiff's costs. If the claimant, therefore, recovered part only of the premises for which the action was brought, the defendant was entitled to have his costs of defending for the part for which the complainant was unsuccessful set off against the costs of the claimant (*Doe* v. *Errington*, 4 Dowl. 602); but this rule was annulled by R. G., H. T. 1853, *post*. See now s. 75 (*ante*, p. 76), and cases cited in note thereto.

Several issues.

Formerly each demise raised a distinct issue (*Doe* v. *Webber*, 2 A. & E. 448). Now, instead of several demises, there will be several plaintiffs (s. 169, *ante*, p. 139). If some of the plaintiffs only be found entitled, the principle of *Doe* v. *Webber* would still seem to be applicable, so as to entitle the defendant to costs as on issues found for him.

Verdict when title appears to have expired before trial.

181. In case the title of the claimant shall appear to have existed as alleged in the writ, and at the time of service thereof, but it shall also appear to have expired before the time of trial, the claimant shall notwithstanding be entitled to a verdict, according to the fact that he was so entitled at the time of bringing the action and serving the writ, and to a judgment for his costs of suit.

The "title" of the claimant here evidently means the right of the claimant to possession of the premises for which ejectment is brought at the time of the issue of the writ. The court would not formerly stay proceedings in an ejectment on the ground of the claimant's title having expired; for though possession could not be obtained, yet the plaintiff had a right to proceed for damages and costs (*Thrustout* v. *Grey*, 2 Str. 1056; see also *Doe* d. *Butt* v. *Rous*, L. J. 22, Q. B. 111). So that this section merely enacts what was the law. The Court of Exchequer in a recent case allowed a writ of possession to issue under this section, although the lease under which the plaintiff held had expired, it not being shown that the claimant had no title at all (*Gibbins* v. *Buckland*, 1 H. & C. 736; L. J. 32, Ex. 156.) See, however, the observations of Westbury, L. C., on this case in *Buckland* v. *Gibbins* (L. J. 32, Ch. 391).

Trial may be ordered to take place in any county.

182. The court or a judge may, on the application of either party, order that the trial shall take place in any county or place other than that in which the venue is laid; and such order being suggested on the record, the trial may be had accordingly.

The venue in local actions might formerly have been changed under 3 & 4 Will. 4, c. 42, s. 22, on a special application, which could therefore only be made after issue joined (*Bell* v. *Harrison*, 4 Dowl. 481). The court has changed the venue, on being satisfied by affidavit that a fair trial could not be had in the county where the venue was laid (*Bell* v. *Harrison*, *ubi supra*; *Briscoe* v. *Roberts*, 3 Dowl. 434). But the court will not change the venue except on special grounds: nor if (*semble*) any special grounds exist for not changing it (*Doe* v. *Harmer*, 1 Har. & Wol. 80).

Non-appearance at trial.

183. If the defendant appears, and the claimant does not appear at the trial, the claimant shall be nonsuited; and if the claimant appears, and the defendant does not appear, the claimant shall be entitled to recover as heretofore, without any proof of his title.

See as to costs in case of nonsuit of claimant, Pl. R., T. T. 1853, r. 29; and as to non-appearance of defendant, and costs in such case, R. G., H. T. 1853, r. 114; and Pl. R., T. T. 1853, r. 30, *post*.

The claimant may also be entitled to a certificate for immediate possession, under 11 Geo. 4 & 1 Will 4, c. 70, s. 38, which provides "that in all cases of trials of ejectments at Nisi Prius when a verdict shall be given for the plaintiff, * * it shall be lawful for the judge before whom the cause shall be tried to certify his opinion on the back of the record that a writ of possession ought to issue immediately, and upon such a certificate a writ of possession may be issued forthwith; and the costs may be taxed, and judgment signed and executed afterward at the usual time as if no such writ had issued; provided always, that such writ, instead of reciting a recovery by judgment in the form now in use, shall recite shortly that the cause came on for trial at Nisi Prius, at such a time and place, and before such a judge (naming the time, place and judge), and that thereupon the said judge certified his opinion that a writ of possession ought to issue immediately."

But this certificate is not applied for often, except in cases of vacant possession, now that judgment may be signed and execution issued in fourteen days (s. 185, *post*, p. 151).

Special verdict and bill of exceptions.

184. The jury may find a special verdict, or either party may tender a bill of exceptions.

Special verdicts are seldom taken, now that error lies upon a special case under C. L. P. A. 1854, s. 32, *post*.

A special verdict ought to be dictated by the court at the trial, and signed by the counsel on both sides, before the jury, who must consent to its terms, are discharged. If, in settling it, any difference of opinion arises about a fact, the opinion of the jury may be taken, and the fact stated accordingly. The plaintiff's attorney afterwards has the verdict drawn up and settled by his counsel from the minutes taken at the trial. It is then sent to the defendant's attorney, who gets it settled by his counsel. If any disagreement arises between the counsel it ought to be settled by the judge who tried the cause, on a summons at chambers. After being settled, it is delivered to the plaintiff's attorney, who ought to enter up the proceedings on the roll.

The special verdict is set down for argument, and copies thereof, together with the points for argument, are delivered to the judges, as in the case of a demurrer. See R. G., H. T. 1853, r. 16, *post*.

A special verdict should state the facts proved, and not the evidence only of the facts (*Bird* v. *Appleton*, 1 East, 111; *Fryer* v. *Roe*, 12 C. B. 437); for upon a special verdict, the court cannot draw from statements therein contained any *inferences* of facts necessary to the determination of the case (*Attorney-General* v. *Baker*, 4 H. & N. 19, 31); such facts must be expressly found one way or the other; and if they are not the court will award a

venire de novo (*Tancred* v. *Christy*, 12 M. & W. 316). See observations as to the form in which a special verdict should be drawn in *Reg.* v. *Sadlers' Company* (3 E. & E. 42; L. J. 30, Q. B. 186); and see R. G., H. T., 25 Vict., *post*.

Amendment of special verdict.

A special verdict may be amended by the judge's notes (*Manners* v. *Postan*, 3 B. & P. 343); or on an affidavit even of what was proved at the trial (*Mayor* v. *Archer*, 1 Str. 514). In the former case, there was a mistake merely as to the date of an instrument; in the latter, the quantities of certain goods sold had not been stated, though they were proved at the trial. It cannot be altered in substance (*Spencer* v. *Goter*, 1 H. Bl. 78), though it may be to carry out the intention of the jury (*Williams* v. *Breedon*, 1 B. & P. 329; *Richardson* v. *Mellish*, 3 Bing. 334). Generally, amendments will be made when the errors are mere misprisions (*Bowers* v. *Nixon*, 12 Q. B. 546).

Judgment upon finding for claimant.

185. Upon a finding for the claimant, judgment may be signed, and execution issue for the recovery of possession of the property, or such part thereof as the jury shall find the claimant entitled to, and for costs, within such time, not exceeding the fifth day in term after the verdict, as the court or judge before whom the cause is tried shall order; and if no such order be made, then on the fifth day in term after the verdict, or within fourteen days after such verdict, whichever shall first happen.

This section is very obscure in its terms; it would seem to have been in the mind of its framer that in a cause tried in term, the claimant should be at liberty to issue execution on the fifth day after verdict at latest; and that in a cause tried in vacation, he should be at liberty to issue execution on the fifteenth day after the verdict at the latest.

The court, or the judge before whom the cause is tried, may order execution to issue at any time not more distant than the fifth day of the first term after the verdict. This section differs, it will be observed, from s. 120 (*ante*, p. 106), which expressly authorizes a judge at chambers to order execution of issue. If it is intended to apply for a new trial, or if a bill of exceptions is tendered at the trial, the judge at the trial ought to be applied to, to order execution to be stayed until the fifth day of the following term.

The costs in ejectment now form part of the judgment, as in other actions; except in the case of judgment on default of appearance to the writ. Formerly, they were only recoverable by execution on the consent rule, under 1 & 2 Vict. c. 110.

See as to costs, where the claimant recovers part only of the premises claimed, *Alcock* v. *Wilshaw* (24 Jur. 628, Q. B., H. T. 1860).

A defendant who has been in execution for the costs, in an action of ejectment, for more than twelve calendar months, is entitled to his discharge under 48 Geo. 3, c. 123 (*Humphreys* v. *Franks*, 3 C. B., N. S. 765).

Judgment upon finding for defendant.

186. Upon a finding for the defendants, or any of them, judgment may be signed, and execution issue for

costs against the claimants named in the writ, within such time, not exceeding the fifth day in term after the verdict, as the court or judge before whom the cause is tried shall order; and if no such order be made, then on the fifth day in term after the verdict, or within fourteen days after such verdict, whichever shall first happen.

See observations on s. 185, *supra*.

As to nonsuit, see Pl. R., T. T. 1853, r. 29, *post*.

The costs of a successful defendant will be awarded, by rule, against the real claimants, although they are not named in the writ (*Mobbs* v. *Vandenbrande*, 4 B. & S. 904; L. J. 33, Q. B. 177).

Execution for recovery of possession and costs may be joint or separate.

187. Upon any judgment in ejectment for recovery of possession and costs, there may be either one writ or separate writs of execution for the recovery of possession and for the costs, at the election of the claimant.

The claimant may either issue a writ of *habere facias possessionem*, and a separate writ of *fi. fa.* or *ca. sa.* for the costs, or he may sue out, as formerly, a writ of *habere*, adding a *fi. fa.* or *ca. sa.* to it, as the case may be.

The suing out of one, or of several writs, depends upon the fact of the defendant being resident, or having goods and chattels in the same county as that in which the property of which possession is to be given is situate. The writ of *habere* can only issue into the county where the property recovered by the judgment lies; the writ of *ca. sa.* or *fi. fa.* may issue into any county (s. 121, *ante*, p. 107). The writ of *habere*, like the writ of *fi. fa.*, is returnable immediately after the execution thereof (*Doe* d. *Hudson* v. *Roe*, 18 Q. B. 806; L. J. 21, Q. B. 359).

These writs are prepared as formerly, by the claimant, and sealed on production of the *incipitur* (s. 206, *post*, p. 159).

As to the sheriff's fees on executing a writ of possession, see s. 123, (*ante*, p. 107).

Defence by joint tenants, tenants in common, or coparceners.

188. In case of such an action being brought by some or one of several persons entitled as joint tenants, tenants in common, or coparceners, any joint tenant, tenant in common, or coparcener in possession, may, at the time of appearance, or within four days after, give notice in the same form as in the notice of a limited defence, that he or she defends as such, and admits the right of the claimant to an undivided share of the property (stating what share), but denies any actual ouster of him from the property, and may, within the same time, file an affidavit stating with reasonable certainty that he or she is such joint tenant, tenant in common, or coparcener, and the

share of such property to which he or she is entitled, and that he or she has not ousted the claimant; and such notice shall be entered in the issue in the same manner as the notice limiting the defence, and upon the trial of such an issue the additional question of whether an actual ouster has taken place shall be tried.

Formerly, in ejectment by one joint tenant against another, the consent-rule limited the confession of the defendant to that of lease and entry. Actual ouster must have been proved. The ouster must still be proved in order to obtain judgment, if the joint tenant in possession gives the notice mentioned in this section.

Actual ouster.

If a tenant in possession claims the whole, and denies possession to the other, this is evidence of an ouster (*Doe* v. *Bird*, 11 East, 49). So where three out of four co-tenants authorized a railway company to use the land, such user was held to amount to an ouster (*Doe* v. *Horn*, 5 M. & W. 564).

Before the stat. 3 & 4 Will. 4, c. 27, a bare perception of the profits by one tenant in common for twenty-six years was no ouster (*Fairclaim* v. *Shackleton*, 5 Burr. 2604), the possession of one joint tenant, coparcener, &c. being at common law the possession of all. By s. 12 of that statute it is enacted, that the possession of land or receipt of rent in entirety by one of several coparceners, joint-tenants, or tenants in common, is not to be deemed the possession or receipt of the others.

It has been decided, in Ireland, that this section does not dispense with proof of actual ouster (*O'Sullivan* v. *M'Swiney*, 1 Longf. & T. 111).

Trial and judgment in ejectment against joint tenants, tenants in common, and coparceners.

189. Upon the trial of such issue as last aforesaid, if it shall be found that the defendant is joint tenant, tenant in common, or coparcener with the claimant, then the question whether an actual ouster has taken place shall be tried, and unless such actual ouster shall be proved, the defendant shall be entitled to judgment and costs; but if it shall be found either that the defendant is not such joint tenant, tenant in common, or coparcener, or that an actual ouster has taken place, then the claimant shall be entitled to such judgment for the recovery of possession and costs.

Action not to abate by death.

190. The death of a claimant or defendant shall not cause the action to abate, but it may be continued as hereinafter mentioned.

This and the following enactments permitting suggestions to be entered of the death of parties in ejectment, are rendered necessary by the abolition of the fictitious John Doe and Richard Roe, who, among other attributes, possessed a species of legal immortality, so that the numerous actions in which they were parties never abated. Not being parties to the action, the liability for costs of the *real* claimants and defendants in the old action of ejectment arose exclusively from the consent rule; this

liability was personal, and binding only to the extent of creating a liability to attachment. A necessary and not a very righteous consequence followed, that the undertakings in the consent rule as to costs could not be enforced against the personal representatives of a deceased party (*Doe* d. *Harrison* v. *Hampson*, 4 C. B. 745). The parties to the new action of ejectment are liable for costs to each other, as in other actions; and this action, which at common law would abate by the death of either party, may now be continued by and against survivors and representatives, as in the case of personal actions.

In *Denison* v. *Holliday* (1 H. & N. 61), where a special case was set down for argument after verdict, and the claimant then died, the Court of Exchequer directed a suggestion of the claimant's death to be entered before argument; it would appear, however, that this direction was erroneous, and was not carried out (see S. C., 1 H. & N. 650, n.), and when the case was called on Pollock, C. B., said the proper course was to proceed with the argument, and after the court had decided whether the verdict should stand or not to enter up judgment *nunc pro tunc*, and this course was accordingly followed (S. C., L. J. 26, Ex. 228): from this last report it appears that a rule was drawn up that the heir should be liable for costs in case judgment should be given against him.

Proceeding upon death before trial, where right survives.

191. In case the right of the deceased claimant shall survive to another claimant, a suggestion may be made of the death, which suggestion shall not be traversable, but shall only be subject to be set aside if untrue, and the action may proceed at the suit of the surviving claimant; and if such a suggestion shall be made before the trial, then the claimant shall have a verdict and recover such judgment as aforesaid, upon its appearing that he was entitled to bring the action either separately or jointly with the deceased claimant.

A suggestion of the death of a claimant may be made, as in the case of the death of a sole plaintiff (s. 136, *ante*, p. 116).

Proceedings upon death before trial, where right does not survive.

192. In case of the death before trial of one of several claimants, whose right does not survive to another or others of the claimants where the legal representative of the deceased claimant shall not become a party to the suit in the manner hereinafter mentioned, a suggestion may be made of the death, which suggestion shall not be traversable, but shall only be subject to be set aside if untrue, and the action may proceed at the suit of the surviving claimant for such share of the property as he is entitled to, and costs.

The legal representatives of one of *several* claimants may become parties under s. 194, *post*, p. 155.

193. In case of a verdict for two or more claimants, if one of such claimants die before execution executed, the other claimant may, whether the legal right to the property shall survive or not, suggest the death in manner aforesaid, and proceed to judgment and execution for recovery of possession of the entirety of the property and the costs; but nothing herein contained shall affect the right of the legal representative of the deceased claimant, or the liability of the surviving claimant to such legal representative; and the entry and possession of such surviving claimant under such execution shall be considered as an entry and possession on behalf of such legal representative in respect of the share of the property to which he shall be entitled as such representative, and the court may direct possession to be delivered accordingly.

Upon death of one of several claimants having obtained a verdict.

194. In case of the death of a sole claimant, or, before trial, of one of several claimants whose right does not survive to another or others of the claimants, the legal representative of such claimant may, by leave of the court or a judge, enter a suggestion of the death, and that he is such legal representative, and the action shall thereupon proceed; and if such suggestion be made before the trial, the truth of the suggestion shall be tried thereat, together with the title of the deceased claimant, and such judgment shall follow upon the verdict in favour of or against the person making such suggestion, as hereinbefore provided, with reference to a judgment for or against such claimant; and in case such suggestion in the case of a sole claimant be made after trial and before execution executed by delivery of possession thereupon, and such suggestion be denied by the defendant within eight days after notice thereof, or such further time as the court or a judge may allow, then such suggestion shall be tried; and if, upon the trial thereof, a verdict shall pass for the person making such suggestion, he shall be entitled to such judgment as aforesaid for the recovery of possession, and for the costs of and occasioned by such suggestion; and in case of a verdict for the defendant, such defendant shall be entitled to such judgment as aforesaid for costs.

Proceedings in case of death of claimant, where right does not survive.

It is doubtful whether this section applies where the claimant dies after verdict and before the argument of a special case (*Denison* v. *Holliday*, 1 H. & N. 61, 650, n.; L. J. 26, Ex. 227, cited *ante*, p. 154).

See as to costs, Gray on Costs, p. 198; and *Denison* v. *Holliday* (*ubi supra*).

Proceedings upon death of one of several joint defendants.

195. In case of the death, before or after judgment, of one of several defendants in ejectment, who defend jointly, a suggestion may be made of the death, which suggestion shall not be traversable, but only be subject to be set aside if untrue, and the action may proceed against the surviving defendant to judgment and execution.

The case of defendants who defend separately is provided for by s. 199 (*post*, p. 157).

Upon death of all the defendants in ejectment before trial.

196. In case of the death of a sole defendant, or of all the defendants in ejectment, before trial, a suggestion may be made of the death, which suggestion shall not be traversable, but only be subject to be set aside if untrue, and the claimants shall be entitled to judgment for recovery of possession of the property, unless some other person shall appear and defend within the time to be appointed for that purpose by the order of the court or a judge, to be made upon the application of the claimants; and it shall be lawful for the court or a judge, upon such suggestion being made, and upon such application as aforesaid, to order that the claimants shall be at liberty to sign judgment within such time as the court or judge may think fit, unless the person then in possession, by himself or his tenant, or the legal representative of the deceased defendant, shall within such time appear and defend the action; and such order may be served in the same manner as the writ; and in case such person shall appear and defend the same, proceedings may be taken against such new defendant as if he had originally appeared and defended the action; and if no appearance be entered and defence made, then the claimant shall be at liberty to sign judgment pursuant to the order.

Upon death of all defendants in ejectment after verdict.

197. In case of the death of a sole defendant, or of all the defendants in ejectment after verdict, the claimants shall nevertheless be entitled to judgment as if no such death had taken place, and to proceed by execution for recovery of possession without suggestion or revivor, and to proceed for the recovery of the costs, in like manner as upon any other judgment for money, against the legal representatives of the deceased defendant or defendants.

Upon death before trial of defendant in ejectment, who defends separately for part.

198. In case of the death before trial of one of several defendants in ejectment, who defends separately for a portion of the property for which the other defendant or defendants do not defend, the same

proceedings may be taken as to such portion as in the case of the death of a sole defendant, or the claimants may proceed against the surviving defendants in respect of the portion of the property for which they defend.

The proceedings under s. 196 (*ante*, p. 156), may be taken with reference to that part of the premises for which the defendant, who has died, defended.

Upon death of defendant defending separately for property in respect of which others also defend

199. In case of the death before trial of one of several defendants in ejectment, who defends separately in respect of property for which surviving defendants also defend, it shall be lawful for the court or a judge at any time before the trial to allow the person at the time of the death in possession of the property, or the legal representative of the deceased defendant, to appear and defend on such terms as may appear reasonable and just, upon the application of such person or representative; and if no such application be made or leave granted, the claimant, suggesting the death in manner aforesaid, may proceed against the surviving defendant or defendants to judgment and execution.

The case of defendants who defend jointly is provided for by s. 195 (*ante*, p. 156).

Claimant may discontinue by notice.

200. The claimant in ejectment shall be at liberty at any time to discontinue the action as to one or more of the defendants, by giving to the defendant or his attorney a notice headed in the court and cause, and signed by the claimant or his attorney, stating that he discontinues such action; and thereupon the defendant, to whom such notice is given, shall be entitled to and may forthwith sign judgment for costs in the form contained in the Schedule (A.) to this act annexed, marked No. 18, or to the like effect.

Discontinuance.

A rule to discontinue was formerly granted in ejectment only by special leave of the court, which would not be given in a hard case; as, after a special verdict, to enable the plaintiff to adduce fresh proof in contradiction. The leave of the court is not now necessary in the case of a sole claimant discontinuing against one of several defendants, but it is required in the case of one of several claimants (s. 201, *infra*).

Discontinuance of action by one of several claimants.

201. In case one of several claimants shall be desirous to discontinue, he may apply to the court or a judge to have his name struck out of the proceedings, and an order may be made thereupon upon such

terms as to the court or judge may seem fit, and the action shall thereupon proceed at the suit of the other claimants.

Judgment for not proceeding to trial after notice.

202. If after appearance entered the claimant, without going to trial, allow the time, allowed for going to trial by the practice of the court in ordinary cases after issue joined, to elapse, the defendant in ejectment may give twenty days' notice to the claimant to proceed to trial at the sittings or assizes next after the expiration of the notice; and if the claimant afterwards neglects to give notice of trial for such sittings or assizes, or to proceed to trial in pursuance of the said notice given by the defendant, and the time for going to trial shall not be extended by the court or a judge, the defendant may sign judgment in the form contained in the Schedule (A.) to this act annexed, marked No. 19, and recover the costs of defence.

The procedure under this section is similar to that under s. 101 (*ante*, p. 92).

Defendant may confess the action.

203. A sole defendant or all the defendants in ejectment shall be at liberty to confess the action as to the whole or part of the property, by giving to such claimant a notice headed in the court and clause, and signed by the defendant or defendants, such signature to be attested by his or their attorney; and thereupon the claimant shall be entitled to and may forthwith sign judgment and issue execution for the recovery of possession and costs in the form contained in the Schedule (A.) to this act annexed, marked No. 20, or to the like effect.

This section provides for the case of a confession (*semble*), after appearance to the writ; for judgment by default may be signed on non-appearance (s. 177, *ante*, p. 147).

This notice is not a *cognovit* within the 1 & 2 Vict. c. 110, s. 9.

The notice should be, as nearly as possible, in the words of the section; be entitled in the court and cause; and be attested by an attorney, stating himself to be "attorney for the defendant."

A judgment signed on a confession given by a tenant in possession, by collusion with the claimant, will be set aside at the instance of the landlord, so that he may be admitted to defend (*Doe* d. *Locke* v. *Franklin*, 7 Taunt. 9; *Doe* v. *Dyer*, 3 Dowl. 696).

The R. G., H. T. 1853, rr. 155—157, *post*, do not seem to apply to notices under this section.

Confession by one of several defendants defending separately for part.

204. In case one of several defendants in ejectment, who defends separately for a portion of the property for which the other defendant or defendants do not defend, shall be desirous of confessing the claimant's

title to such portion, he may give a like notice to the claimant; and thereupon the claimant shall be entitled to and may forthwith sign judgment and issue execution for the recovery of possession of such portion of the property, and for the costs occasioned by the defence relating to the same, and the action may proceed as to the residue.

Confession by one of several defendants who defend for same property.

205. In case one of several defendants in ejectment, who defends separately in respect of property for which other defendants also defend, shall be desirous of confessing the claimant's title he may give a like notice thereof; and thereupon the claimant shall be entitled to and may sign judgment against such defendant for the costs occasioned by his defence, and may proceed in the action against the other defendants to judgment and execution.

Formal entry of judgment on the roll unnecessary for purposes of execution.

206. It shall not be necessary before issuing execution upon any judgment under the authority of this act to enter the proceedings upon any roll, but an *incipitur* thereof may be made upon paper, shortly describing the nature of the judgment according to the practice heretofore used, and judgment may thereupon be signed, and costs taxed, and execution issued, according to the practice heretofore used: provided nevertheless, that the proceedings may be entered upon the roll whenever the same may become necessary for the purpose of evidence, or of bringing error, or the like.

Although this section is placed among the sections of this statute which relate exclusively to the action of ejectment; it applies, it will be observed, *to any judgment under the authority of this act*, and, consequently, of the other acts in which this is incorporated. It did not however apply to judgments in replevin, nor to judgments signed on the return of writ of trial, nor in suits removed by *certiorari* from inferior courts. But see now R. G., H. T. 1853, rr. 70, 71, *post*; whereby uniformity of procedure upon judgments is provided.

See as to entering a judgment, *Frewen* v. *Lethbridge* (7 W. R. 442, Ex., E. T. 1859), and note to s. 139 (*ante*, p. 119).

See as to taxing costs, R. G., H. T. 1853, rr. 59—61, *post*; and *Field* v. *Partridge* (7 Exch. 689).

Effect of judgment.

207. The effect of a judgment in an action of ejectment under this act shall be the same as that of a judgment in the action of ejectment hereto used.

It has therefore been held that a defendant in execution for costs is entitled to his discharge at the expiration of one year under 48 Geo. 3, c. 123 (*Humphreys* v. *Franks*, 3 C. B., N. S. 765).

The effect of a judgment in ejectment is fully stated in *Aslin*

v. *Parker* (2 Burr. 665). It is conclusive evidence of the title of the claimant to all the mesne profits accruing subsequently to the date of the claim alleged in the writ, which must be laid subsequent to the time when the right of entry accrued. See *Doe* v. *Wellsman* (2 Exch. 368); and the judgment of Parke, B., in *Turner* v. *Coalbrook Steam Company* (5 Exch. 932): see also *Wilkinson* v. *Kirby* (15 C. B. 430); and *Barnett* v. *Guildford, Earl of* (L. J. 24, Ex. 81).

C. L. P. A. 1854, *s.* 93. The C. L. P. A. 1854, s. 93, provides that the claimant in a second ejectment for the same premises against the same defendant may be ordered to give security for costs; see note thereon, *post*.

Error and bail in error in ejectment.

208. Error may be brought in like manner as in other actions upon any judgment in ejectment, *after a special verdict found by the jury, or a bill of exceptions, or by consent after a special case stated*, but, *except in the case of such consent as aforesaid*,* execution shall not be thereby stayed, unless the plaintiff in error shall, within four clear days after lodging the memorandum alleging error, or after the signing of the judgment, whichever shall last happen, or before execution executed, be bound unto the claimant, who shall have recovered judgment in such action of ejectment, in double the yearly value of the property, and double the costs recovered by the judgment, with condition, that if the judgment shall be affirmed by the Court of Error, or the proceedings in error be discontinued by the plaintiff therein, then the plaintiff in error shall pay such costs, damages and sum or sums of money as shall be awarded upon or after such judgment affirmed or discontinuance; and it shall be lawful for the court wherein execution ought to be granted upon such affirmation or discontinuance, upon the application of the claimant, to issue a writ to inquire as well of the mesne profits as of the damage by any waste committed after the first judgment in ejectment, which writ may be tested on the day on which it shall issue, and be returnable immediately after the execution thereof; and upon the return thereof judgment shall be given, and execution awarded for such mesne profits and damages, and also for costs of suit.

This section is partly a re-enactment and adaptation to the new action of ejectment of the stat. 16 & 17 Car. 2, c. 8, ss. 3, 4. It requires bail in error to be given only by the defendant below.

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* "The words in italics appear to have been left in by mistake; they refer to a clause which was struck out of the bill in the House of Lords." Chit. Stat. 3rd edit. vol ii. p. 752, n. (*c*).

The claimant, therefore, may bring error without giving bail; see s. 151, and note (*ante*, p. 129).

The bail in error (16 & 17 Car. 2, c. 8) were not chargeable in an action on the recognizance with mesne profits, where they had not been ascertained by a writ of inquiry (*Doe* v. *Sawyer*, 2 M. & S. 247).

Tenants to give notice of ejectment to landlord.

209. Every tenant to whom any writ in ejectment shall be delivered, or to whose knowledge it shall come, shall forthwith give notice thereof to his landlord, or his bailiff or receiver, under penalty of forfeiting the value of three years' improved or rack rent of the premises demised or holden in the possession of such tenant, to the person of whom he holds, to be recovered by action in any court of common law having jurisdiction for the amount.

The court will, in some instances, set aside regular judgments at the instance of a landlord, on the ground that he has not received notice of the proceeding (s. 172, n., *ante*, p. 145).

The object of this section is to insure his obtaining immediate information from the tenant, so that he may enter an appearance if necessary (s. 172, *ante*, p. 143).

The improved or rack rent here mentioned is not the rent reserved, but such a rent as might be fairly agreed on at the time of the service of the writ, in case the premises were then to be let (*Croker* v. *Fothergill*, 2 B. & A. 652).

In what cases notice must be given.

The 11 Geo. 2, c. 19, s. 12, of which this section is a re-enactment, has been held to extend to those cases only where ejectments are brought which are inconsistent with the landlord's title; and therefore a tenant to a mortgagor, who did not give him notice of an ejectment brought by the mortgagee to enforce an attornment, was held not to be liable to the penalties there mentioned; the act expressly permitting an ejectment to be brought for such a purpose (*Buckley* v. *Buckley*, 1 T. R. 647).

Though the 4 Anne, c. 16, and 11 Geo. 2, c. 19, have almost entirely dispensed with the necessity of such a proceeding, an attornment is still desirable where a mortgagor in possession has made a lease after the mortgage. The mortgagee cannot, by merely giving the lessee notice, entitle himself to distrain for rent; and attornment is necessary to create between them the relation of landlord and tenant (*Evans* v. *Elliot*, 9 A. & E. 342).

Proceedings in ejectment by landlord for nonpayment of rent.

210. In all cases between landlord and tenant, as often as it shall happen that one half-year's rent shall be in arrear, and the landlord or lessor, to whom the same is due, hath right by law to re-enter for the nonpayment thereof, such landlord or lessor shall and may, without any formal demand or re-entry, serve a writ in ejectment for the recovery of the demised premises, or in case the same cannot be legally served, or no tenant be in actual possession of the premises, then such landlord or lessor may affix a copy thereof upon the door of any demised messuage, or in case such

action in ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements or hereditaments comprised in such writ in ejectment, and such affixing shall be deemed legal service thereof, which service or affixing such writ in ejectment shall stand in the place and stead of a demand and re-entry; and in case of judgment against the defendant for non-appearance, if it shall be made appear to the court where the said action is depending, by affidavit, or be proved upon the trial in case the defendant appears, that half a year's rent was due before the said writ was served,* and that no sufficient distress was to be found on the demised premises countervailing the arrears then due, and that the lessor had power to re-enter, then and in every such case the lessor shall recover judgment and execution in the same manner as if the rent in arrear had been legally demanded, and a re-entry made; and in case the lessee or his assignee, or other person claiming or deriving under the said lease, shall permit and suffer judgment to be had and recovered on such trial in ejectment, and execution to be executed thereon, without paying the rent and arrears, together with full costs, and without proceeding for relief in equity within six months after such execution executed, then and in such case the said lessee, his assignee, and all other persons claiming and deriving under the said lease, shall be barred and foreclosed from all relief or remedy in law or equity, other than by bringing error for reversal of such judgment, in case the same shall be erroneous, and the said landlord or lessor shall from thenceforth hold the said demised premises discharged from such lease; and if on such ejectment a verdict shall pass for the defendant, or the claimant shall be nonsuited therein, then in every such case such defendant shall have and recover his costs; provided that nothing herein contained shall extend to bar the right of any mortgagee of such lease, or any part thereof, who shall not be in possession, so as such mortgagee shall and do, within six months after such judgment obtained and execution executed, pay all rent in arrear, and all costs and damages sustained by such lessor or person entitled to the remainder or reversion as aforesaid, and perform all the

Foreclosure after six months from execution.

Saving in favour of mortgagees.

* In proceeding under this section, it would seem well to be able to prove that the half-year's rent was due before the writ was "sued out" (*Doe* d. *Gretton* v. *Roe*, 4 C. B. 576).

covenants and agreements which, on the part and behalf of the first lessee, are and ought to be performed.

In what cases this section applies.

This section is a re-enactment of 4 Geo. 2, c. 28, s. 2, the cases decided upon which are collected in 1 Wms. Saund. 287 a.

The provisions of this section apply to those cases only where the right to enter is absolute (not *quousque*), and where the lease upon such re-entry is forfeited (*Doe* d. *Darke* v. *Bowditch*, 8 Q. B. 973). By the 22 & 23 Vict. c. 35, s. 3, the assignee of part of the reversion, where the rent has been apportioned, has, in respect of such apportioned rent, the same benefit of a condition for re-entry for non-payment of that rent, as if the apportioned rent had been specifically reserved upon the original lease, as incident to his part of the reversion.

The right of re-entry (under the statute) is not necessarily waived by taking, before the time limited for payment to save the forfeiture, an *insufficient* distress for the rent, even though the lessor continue in possession under the distress after the time so limited (*Doe* d. *Taylor* v. *Johnson*, 1 Stark. 411); but a right of entry for forfeiture may be waived by bringing an action for rent accrued due subsequent to the forfeiture (*Dendy* v. *Nicholl*, 4 C. B., N. S. 376). A demand of rent is not necessarily a waiver (*Blyth* v. *Dennet*, 13 C. B. 178).

It must clearly appear that the landlord had a power to re-enter in respect of the non-payment of half a year's rent remaining actually due (*Cotesworth* v. *Spokes*, 10 C. B., N. S. 103; L. J., 30, C. P. 220) at the time of issuing the writ (*Doe* d. *Dixon* v. *Roe*, 7 C. B. 134).

Demand of rent unnecessary.

No demand of rent is necessary, as at common law, even if the proviso for re-entry is expressed to be in case of the rent in arrear being *lawfully demanded* (*Doe* v. *Alexander*, 2 M. & S. 525). It may be otherwise if there is an express covenant not to enter without demand (*Doe* v. *Wilson*, 5 B. & A. 385), and where the condition was, that on payment of half a year's rent the landlord might re-enter for the same *till it were fully satisfied*, it was held that he could not proceed under the 4 Geo. 2, c. 28 (*Doe* d. *Darke* v. *Bowditch*, *ubi supra*).

The writ must be dated after the last day when the rent ought to be paid (*Doe* v. *Shawcross*, 3 B. & C. 754).

No sufficient distress.

The action can only be sustained in case there is no sufficient distress on the premises, and the insufficiency of the distress must be clearly established (*Doe* d. *Forster* v. *Wandlass*, 7 T. R. 117); every part of the premises must be searched (*Rees* v. *King*, 2 B. & B. 514; see also *Price* v. *Worwood*, 4 H. & N. 512). If a broker going to distrain, by using reasonable diligence would not find sufficient to distrain, this will constitute an insufficiency within the section (*Doe* d. *Haverson* v. *Franks*, 2 C. & K. 678). So if the tenant, by locking up the premises, prevents the goods from being found, that is, "got at," to distrain (*Doe* v. *Dyson*, M. & M. 77; *Doe* v. *Cox*, 5 D. & L. 272; *Romily* v. *Fycroft*, 4 W. R. 28, Ex., M. T. 1855). Proof that no sufficient distress was found on the premises on any one day after the time limited for payment of the rent, to save the forfeiture, is *primâ-facie* evidence,

and is sufficient to bring the case within the statute, unless the defendant shows that there was a sufficient distress (*Doe* v. *Fuchau*, 15 East, 286).

It would seem that the goods of a person who is in charge of part of the property on behalf of the plaintiff, need not be taken into account as distrainable in proceedings under this section (*Wheeler* v. *Stevenson*, 6 H. & N. 155; L. J. 30, Ex. 46).

The intention of this section, as was that of 4 Geo. 2, c. 28, s. 2, is to relieve the landlord from the inconvenience of continuing liable to an uncertainty of possession; it being in the power of the tenant to offer him a compensation *at any time*, in order to found an application for relief against the forfeiture in a Court of Equity; and to confine the tenant to *six calendar months* after execution executed for his doing this (*Doe* v. *Lewis*, 1 Burr. 619). This section prescribes the mode of proceeding in two cases, viz.: 1stly, in the case of judgment against the defendant for non-appearance; 2ndly, in the case of the action coming on for trial.

Proof in case of judgment by default.

1. In the case of judgment by default, an affidavit must be made that half a year's rent was due at the time when (*Cotesworth* v. *Spokes*, *ubi supra*) the writ was served (*quære* sued out, *vide infra*); that no sufficient distress was to be found upon the premises countervailing the arrears then due; and that the lessor (claimant) had power to re-enter.

Great precision was formerly required in the affidavit as to *half a year's rent* (and not more) being due; upon the ground that a landlord has no right to lie by for a length of time (for instance, a whole year), and then seek thus to render the provisions of the section available (*Doe* d. *Powell* v. *Rowe*, 9 Dowl. 548, *per* Coleridge, J.; but see *Doe* d. *Gretton* v. *Roe*, 4 C. B. 576; and *Cross* v. *Jordan*, 8 Exch. 149).

It would seem, also, from the *quære* to *Doe* d. *Gretton* v. *Roe* (*ubi supra*), that it would be better that the affidavit should state the rent to be due before the writ was *sued out*.

Where judgment has been obtained upon an affidavit, which the claimant is apprehensive may be held to be defective, the court will allow the judgment to be superseded, and another judgment to be signed, on an amended affidavit (*Doe* d. *Gretton* v. *Roe*, *ubi supra*).

The motion for judgment, where the defendant does not appear, is absolute in the first instance (*Cross* v. *Jordan*, *ubi supra*; and *Youens* v. *Keen*, 2 C. B., N. S. 384).

If there is a sufficient distress on the premises, the statute does not apply; and the lessor must proceed at common law, as before the statute (*Doe* d. *Forster* v. *Wandlass*, *ubi supra*), and subject himself to all the risks and inconveniences of so proceeding (Adams, Eject. 121; and 1 Wms. Saunders, 281 b, *et seq.*); unless the terms of the lease provide against the lessee's right to a legal demand of the rent (*Doe* d. *Harris* v. *Masters*, 2 B. & C. 490).

Proof where the defendant goes to trial.

2. In the case of the action coming on for trial, the claimant, in order to recover, must prove that, which he must, in the case of judgment by default, state in the affidavit (*Doe* v. *Lewis*, 1 Burr. 619).

Where a landlord or lessor proceeds for the recovery of a dwell-

ing-house and other premises demised by one lease, if the dwelling-house is unoccupied, and the rest of the premises is in the occupation of a tenant, service of the writ of ejectment may be effected by personally serving the tenant with a copy, and affixing another on the front door of the house (*Clinton, Lord* v. *Wales*, 2 Jur., N. S. 1096, Ex. M. T. 1856).

See now the provisions for relief of tenants against forfeiture, C. L. P. A. 1860, ss. 1—11. *post*. *C. L. P. A.* 1860.

Lessee proceeding in equity not to have injunction or relief without payment of rent and costs.

211. In case the said lessee, his assignee or other person claiming any right, title or interest, in law or equity of, in, or to the said lease, shall, within the time aforesaid, proceed for relief in any court of equity, such person shall not have or continue any injunction against the proceedings at law on such ejectment, unless he does or shall, within forty days next after a full and perfect answer shall be made by the claimant in such ejectment, bring into court, and lodge with the proper officer, such sum and sums of money as the lessor or landlord shall in his answer swear to be due and in arrear over and above all just allowances, and also the costs taxed in the said suit, there to remain till the hearing of the cause, or to be paid out to the lessor or landlord on good security, subject to the decree of the court; and in case such proceedings for relief in equity shall be taken within the time aforesaid, and after execution is executed, the lessor or landlord shall be accountable only for so much and no more as he shall really and *bonâ fide*, without fraud, deceit, or wilful neglect, make of the demised premises from the time of his entering into the actual possession thereof; and if what shall be so made by the lessor or landlord happen to be less than the rent reserved on the said lease, then the said lessee or his assignee, before he shall be restored to his possession, shall pay such lessor or landlord what the money so by him made fell short of the reserved rent for the time such lessor or landlord held the said lands.

See as to relief formerly afforded by the Court of Chancery, *Prachey* v. *Duke of Somerset*, and notes thereto, in Tudor's Leading Cases in Equity, 2nd edit. vol. ii. pp. 895, *et seq*.

Tenant paying all rent with costs, proceedings to cease.

212. If the tenant or his assignee do or shall, at any time before the trial in such ejectment, pay or tender to the lessor or landlord, his executors or administrators, or his or their attorney in that cause, or pay into the court where the same cause is depending, all the rent and arrears, together with the costs, then and in such case all further proceedings on the said ejectment

shall cease and be discontinued; and if such lessee, his executors, administrators or assigns, shall, upon such proceedings as aforesaid, be relieved in equity, he and they shall have, hold and enjoy the demised lands, according to the lease thereof made, without any new lease.

A sub-lessee is an assignee within this section, and may apply for a stay of proceedings (*Doe* d. *Wyatt* v. *Byron*, 1 C. B. 623); so may a mortgagee (*Doe* d. *Whitfield* v. *Roe*, 3 Taunt. 402).

The application to stay proceedings must, under this section, have been made *before* trial (*Doe* d. *West* v. *Davis*, 7 East, 363; but see now C. L. P. A. 1860, s. 1, *post*). Relief will be granted where the tender of rent has been made before the action is actually commenced (*Goodright* v. *Noright*, 2 W. Bl. 746).

How rent to be calculated. Upon making application under this section, the rent should be calculated to the last *rent* day, and not to the day of computing (*Doe* d. *Harcourt* v. *Roe*, 4 Taunt. 883). The court had no power to stay proceedings in an ejectment brought for a forfeiture for breaches other than for non-payment of rent (*Doe* d. *Mayhew* v. *Ashby*, 10 A. & E. 71).

C. L. P. A. 1860. But see now C. L. P. A. 1860, ss. 1—11, *post*.

Ejectment by landlord against tenant holding over after expiration of term or determination of notice to quit.

213. Where the term or interest of any tenant now or hereafter holding under a lease or agreement in writing any lands, tenements or hereditaments for any term or number of years, certain, or from year to year, shall have expired or been determined either by the landlord or tenant by regular notice to quit, and such tenant, or any one holding or claiming by or under him, shall refuse to deliver up possession accordingly, after lawful demand in writing made and signed by the landlord or his agent, and served personally upon or left at the dwelling-house or usual place of abode of such tenant or person, and the landlord shall thereupon proceed by action of ejectment for the recovery of possession, it shall be lawful for him, at the foot of the writ in ejectment, to address a notice to such tenant or person, requiring him to find such bail, if ordered by the court or a judge, and for such purposes as are hereinafter next specified; and upon the appearance of the party on an affidavit of service of the writ and notice, it shall be lawful for the landlord producing the lease or agreement, or some counterpart or duplicate thereof, and proving the execution of the same by affidavit, and upon affidavit that the premises have been actually enjoyed under such lease or agreement, and that the interest of the tenant has expired, or been determined by regular notice to quit, as the case may be, and that possession has been lawfully demanded in manner aforesaid, to move the court

Rule or summons for the tenant to give bail.

or apply by summons to a judge at chambers for a rule or summons for such tenant or person to show cause, within a time to be fixed by the court or judge on a consideration of the situation of the premises, why such tenant or person should not enter into a recognizance by himself and two sufficient sureties in a reasonable sum conditioned to pay the costs and damages which shall be recovered by the claimants in the action; and it shall be lawful for the court or judge upon cause shown, or upon affidavit of the service of the rule or summons in case no cause shall be shown, to make the same absolute in the whole or in part, and to order such tenant or person, within a time to be fixed, upon a consideration of all the circumstances, to find such bail, with such conditions and in such manner as shall be specified in the said rule or summons, or such part of the same so made absolute; and in case the party shall neglect or refuse so to do, and shall lay no ground to induce the court or judge to enlarge the time for obeying the same, then the lessor or landlord filing an affidavit that such rule or order has been made and served and not complied with shall be at liberty to sign judgment for recovery of possession and costs of suit in the form contained in the Schedule (A.) to this act annexed, marked No. 21, or to the like effect.

On rule or summons absolute, if tenant shall not conform, judgment shall be for the landlord.

This and the following sections re-enact 1 Geo. 4, c. 87.

In what cases this section applies.

The words "under a lease or agreement in writing" apply to the whole sentence, and are not confined to the case of a tenant holding for a "term or number of years certain" (*Doe* d. *Bradford* v. *Roe*, 5 B. & A. 770). A letting by parol, therefore, will not suffice (*Doe* d. *Stepney* v. *Thrustout*, M'Cle. & Y. 492); but an agreement in writing to hold apartments for three months has been held to be within this section (*Doe* d. *Phillips* v. *Roe*, 5 B. & A. 766). A holding from quarter to quarter, with an agreement to quit on three months' notice, is not a holding for a term, or number of years certain (*Doe* d. *Carter* v. *Roe*, 2 Dowl. N. S. 449); nor is a tenancy for a term of years "should *A.*, *B.* and *C.* so long live" (*Doe* d. *Pemberton* v. *Roe*, 7 B. & C. 2).

Term must have expired or been determined.

The term must have expired or been determined by regular notice to quit; therefore a tenant who has surrendered his term, but refuses to quit the premises, cannot be proceeded against under this section (*Doe* d. *Tindal* v. *Roe*, 2 B. & Ad. 922); nor can a tenant who has determined his interest, by notice to quit, and holds over (*Doe* d. *Cardigan* v. *Roe*, 1 D. & R. 540); nor a tenant who has been permitted to hold over for more than a year after his interest had expired; a tenancy from year to year having been thereby created (*Doe* d. *Thomas* v. *Field*, 2 Dowl. 542).

The statute only applies to terms that have come to a natural

end, or been extinguished by regular notice (*Doe* d. *Tindal* v. *Roe*, *ubi supra*). It does not apply where a right of entry is claimed for non-performance of covenants (*Doe* d. *Cundley* v. *Sharpley*, 15 M. & W. 558); nor where the title to the premises is in dispute (*Doe* d. *Saunders* v. *Roe*, 1 Dowl. 4).

A tenant may avail himself of the statute against his under-tenant (*Doe* d. *Watts* v. *Roe*, 5 Dowl. 513); and a tenant in common may take advantage of it (*Doe* v. *Rotherham*, 6 Dowl. 690).

Demand of possession. The demand of possession must be in writing.

Service of demand. It must be served personally, or left at the dwelling-house or usual abode of the tenant. Where the tenant had gone to America, service of the demand, by leaving the demand on the premises (the tenant's wife, who was in possession, having refused to take it), was held only sufficient to entitle the landlord to a rule *nisi* to show cause why the service should not be deemed good service (*Doe* d. *Selgood* v. *Roe*, 1 W. W. & Har. 206).

Proceedings under this section. If the tenant refuses to deliver up possession, according to the demand, the landlord may then sue out a writ of ejectment, and at the foot of it address a notice to the tenant requiring him to find bail, if ordered by the court, or a judge, in the terms of the section.

Notice of bail being required. The notice should be signed by the landlord or his agent (*Anon.* 1 D. & R. 435; *Doe* d. *Beard* v. *Roe*, 1 M. & W. 300); but no affidavit of the fact of the agency, if it is signed by an agent, is necessary (*Doe* d. *Geldart*, 1 W. W. & Har. 346); the writ and notice are to be served as an ordinary writ of ejectment (s. 170, n., *ante*, p. 140).

If the tenant does not appear to the writ, there may be judgment against him as above provided.

Application for rule or order for bail. If the tenant enters an appearance, the landlord may either move the court, or take out a summons at chambers, calling upon the tenant to show cause, &c. in the terms of the section. The application, either to the court or to a judge at chambers, must be founded on—

1. An affidavit of service of the writ and notice.

2. Production of the lease or agreement, or a counterpart or duplicate, properly stamped (*Doe* d. *Caulfield* v. *Roe*, 3 Bing. N. C. 329; *Doe* d. *Holden* v. *Rushworth*, 4 M. & W. 74), accompanied by an affidavit of the due execution thereof. This affidavit need not be made by the attesting witness (*Doe* d. *Gowland* v. *Roe*, 6 Dowl. 35; and see now C. L. P. A. 1854, s. 26, *post*).

What the affidavit must state. 3. An affidavit, stating that the premises have been actually enjoyed under the lease or agreement produced, and specially referring to such lease, agreement, counterpart or duplicate, which ought to be annexed to the affidavit (*Doe* d. *Foucan* v. *Roe*, 2 L. M. & P. 322); and showing that the interest of the tenant has expired, or been determined by a *regular* notice to quit (*Doe* d. *Topping* v. *Boast*, 7 Dowl. 487); and that possession has been lawfully demanded in the manner prescribed by this section. The affidavit should also state the annual value of the property, so as

to enable the court to fix the amount for which security (if ordered) is to be given.

Judgment.

The rule *nisi*, or summons, may require that the claimant shall be at liberty to sign judgment, if the defendant does not give security within the time limited (*Doe* v. *Roe*, 2 Dowl. 180).

A retaking of the premises by the defendant may be shown for cause against the rule or summons (*Roe* d. *Durant* v. *Doe*, 6 Bing. 574). If no cause is shown against the rule or summons, then on the usual affidavit of service, the rule will be made absolute, or an order upon the summons will be made at chambers.

The rule or order should be duly served; and, if disobeyed, the plaintiff, upon filing affidavits verifying the order, and showing service and default, will be at liberty to sign judgment.

Costs.

In cases under this section, the court will only give a reasonable sum for the costs, and nothing for mesne profits (*Doe* d. *Sampson* v. *Roe*, 6 Moore, 54), or for damages alleged to have been caused to the value of the premises for the purposes of trade (*Doe* d. *Marks* v. *Roe*, 6 D. & L. 87).

Bail.

If bail is ordered, the time within which the recognizance is to be entered into should be fixed by the rule absolute, or order at chambers (*Doe* d. *Anglesea* v. *Brown*, 2 D. & R. 688).

Bail is put in, in the ordinary way, and the tenant should join (but see s. 151, and note, *ante*, p. 129). The recognizance is ordinarily to the extent of a year's value of the premises, and a reasonable sum for costs to be computed by the master (*Doe* d. *Levi* v. *Roe*, 6 C. B. 276).

On trial of any ejectment between landlord and tenant, juries to give damages for mesne profits down to the verdict, or to a day specified therein.

214. Wherever it shall appear on the trial of any ejectment, at the suit of a landlord against a tenant, that such tenant or his attorney hath been served with due notice of trial, the judge before whom such cause shall come on to be tried shall, whether the defendant shall appear upon such trial or not, permit the claimant on the trial, after proof of his right to recover possession of the whole or of any part of the premises mentioned in the writ in ejectment, to go into evidence of the mesne profits thereof which shall or might have accrued from the day of the expiration or determination of the tenant's interest in the same down to the time of the verdict given in the cause, or to some preceding day to be specially mentioned therein; and the jury on the trial finding for the claimant shall in such case give their verdict upon the whole matter, both as to the recovery of the whole or any part of the premises, and also as to the amount of the damages to be paid for such mesne profits; and in such case the landlord shall have judgment within the time hereinbefore provided, not only for the recovery of possession and costs, but also for the mesne profits found by the jury: provided always, that

nothing hereinbefore contained shall be construed to bar any such landlord from bringing any action for the mesne profits which shall accrue from the verdict, or the day so specified therein, down to the day of the delivery of possession of the premises recovered in the ejectment.

Mesne profits.

Damages may be recovered under this section for mesne profits down to the day of trial, though no notice of trial is proved (if the defendant appears at the trial), and although no notice of claim of mesne profits has been given (*Doe* d. *Thompson* v. *Hodgson*, 12 A. & E. 135; *Smith* v. *Pelt*, 9 Exch. 307); but strict proof of title is required; and, therefore, where the defendant does not appear, it may sometimes be prudent not to proceed for the mesne profits, which may be recovered in a subsequent action (s. 218, *post*, p. 172), wherein the plaintiff's title will be protected by estoppel through the judgment in ejectment.

As to judgment, see s. 185, (*ante*, p. 151).

On trials after bail found, judge shall not stay the execution except by consent or on tenant's finding security.

215. In all cases in which such security shall have been given as aforesaid, if upon the trial a verdict shall pass for the claimant, unless it shall appear to the judge before whom the same shall have been had that the finding of the jury was contrary to the evidence, or that the damages given were excessive, such judge shall not, except by consent, make any order to stay judgment or execution, except on condition that within four days from the day of the trial the defendant shall actually find security, by the recognizance of himself and two sufficient sureties, in such reasonable sum as the judge shall direct, conditioned not to commit any waste, or act in the nature of waste, or other wilful damage, and not to sell or carry off any standing crops, hay, straw or manure produced or made (if any) upon the premises, and which may happen to be thereupon, from the day on which the verdict shall have been given to the day on which execution shall finally be made upon the judgment, or the same be set aside, as the case may be: provided always, that the recognizance last above mentioned shall immediately stand discharged and be of no effect, in case proceedings in error shall be brought upon such judgment, and the plaintiff in error shall become bound in the manner hereinbefore provided.

Bail in error to discharge such security.

The defendant must give two additional sureties on bringing error, although he has before given two sureties in the action (*Doe* d. *Durant* v. *Moore*, 1 Dowl. 203).

Recognizances to

216. All recognizances and securities entered into

as last aforesaid may and shall be taken respectively in such manner and by and before such persons as are provided and authorized in respect of recognizances of bail upon actions and suits depending in the court in which any such action of ejectment shall have been commenced; and the officer of the same court with whom recognizances of bail are filed shall file such recognizances and securities, for which respectively the sum of two shillings and sixpence, and no more, shall be paid;* but no action or other proceeding shall be commenced upon any such recognizance or security after the expiration of six months from the time when possession of the premises or any part thereof shall actually have been delivered to the landlord.

be taken as other recognizances of bail; actions on them limited.

217. In all actions of ejectment hereafter to be brought in any of her Majesty's courts at Westminster by any landlord against his tenant, or against any person claiming through or under such tenant, for the recovery of any lands or hereditaments in any county, except London or Middlesex, where the tenancy shall expire, or the right of entry into or upon such lands or hereditaments shall accrue to such landlord, in or after Hilary or Trinity terms respectively, it shall be lawful for the claimant in any such action, at any time within ten days after such tenancy shall expire, or right of entry accrue as aforesaid, to serve a writ in ejectment in the form contained in the Schedule (A.) to this act annexed, marked No. 13, except that it shall command the persons to whom it is directed to appear within ten days after service thereof in the court in which such action may be brought; and the like proceedings shall be thereupon had as hereinbefore provided, save that it shall be sufficient to give at least six clear days' notice of trial to the defendant before the commission day of the assizes at which such ejectment is intended to be tried; and any defendant in such action may, at any time before the trial thereof, apply to a judge by summons to stay or set aside the proceedings, or to postpone the trial until the next assizes; and it shall be lawful for the judge, in his discretion, to make such order in the said cause as to him shall seem expedient.

Landlord to recover possession of lands, &c. after service of writ in ejectment.

* It may be here mentioned that by stat. 28 Vict. c. 45, s. 1, *post*, it is enacted, that all fees payable in the superior courts of common law and the offices thereof shall be paid by stamps; the manner in which the stamps shall be applied is regulated by R. G., M. T. 1865, *post*.

In what cases.

This is a re-enactment of the 11 Geo. 4 & 1 Will. 4, c. 70, s. 36, which applied only where the right of entry accrued *during* or *immediately after* an issuable term, and not where an assize intervened between an issuable term and the right of entry (*Doe* d. *Milner* v. *Roe*, 2 L. M. & P. 578). The former statute did not, nor does this section, apply to cases where the premises are situate in Middlesex (*Doe* d. *Norris* v. *Roe*, 1 Dowl. 547), nor in London.

Form of writ.

This writ is in the usual form of writs of ejectment, except that the time for appearance is ten days. The subsequent proceedings are the same as in other actions of ejectment, except as to the length of the notice of trial, which is specially limited above. In case of non-appearance, judgment may be signed; and the affidavit of service should state when the tenancy expired or right of entry accrued, in order that it may appear that the proceedings are in accordance with this section.

If the defendant appears at the trial, he waives his right to six days' notice of trial (*Doe* d. *Antrobus* v. *Jepson*, 3 B. & Ad. 402).

At Nisi Prius, it cannot be objected that the action was not commenced within ten days after the right of entry accrued, this being only an irregularity (*Doe* d. *Rankin* v. *Brindley*, 4 B. & Ad. 84).

Saving of former remedies.

218. Nothing herein contained shall be construed to prejudice or affect any other right of action or remedy which landlords may possess in any of the cases hereinbefore provided for, otherwise than hereinbefore expressly enacted.

See s. 221 (*post*, p. 174).

In ejectment by mortgagee, the mortgagor's rendering the principal, interest and costs in court shall be deemed a full satisfaction, and the court may compel the mortgagee to re-convey.

219. Where an action of ejectment shall be brought by any mortgagee, his heirs, executors, administrators or assignees, for the recovery of the possession of any mortgaged lands, tenements or hereditaments, and no suit shall be then depending in any of her Majesty's courts of equity in that part of Great Britain called England, for or touching the foreclosing or redeeming of such mortgaged lands, tenements or hereditaments, if the person having right to redeem such mortgaged lands, tenements or hereditaments, and who shall appear and become defendant in such action, shall, at any time pending such action, pay unto such mortgagee, or, in case of his refusal,* shall bring into court, where such action shall be depending, all the principal monies and interest due on such mortgage, and also all such costs as have been expended in any suit at law or in equity upon such mortgage (such money for principal, interest and costs to be ascertained and computed by

* To accept such payment.

the court where such action is or shall be depending, or by the proper officer by such court to be appointed for that purpose), the monies so paid to such mortgagee, or brought into such court, shall be deemed and taken to be in full satisfaction and discharge of such mortgage, and the court shall and may discharge every such mortgagor or defendant of and from the same accordingly; and shall and may by rule of the same court compel such mortgagee, at the costs and charges of such mortgagor, to assign, surrender or re-convey mortgaged lands, tenements and hereditaments, and such estate and interest as such mortgagee has therein, and deliver up all* deeds, evidences and writings in his custody, relating to the title of such mortgaged lands, tenements and hereditaments, unto such mortgagor, who shall have paid or brought such monies into the court, his heirs, executors or administrators, or to such other person or persons as he or they shall for that purpose nominate or appoint.

When to apply under this section.

This section is not a mere re-enactment of 7 Geo. 2, c. 20, s. 1; although it gives powers similar to those conferred by that statute. An application for a stay of proceedings under it ought to be made before execution executed, and ought to be founded on an affidavit stating that no suit in equity is pending (Adams, Eject. 318). The defendant must also have appeared to the action (*Doe* d. *Hurst* v. *Clifton*, 4 A. & E. 814), and this fact ought to be stated in the affidavit (*Doe* d. *Cox* v. *Brown*, 6 Dowl. 471).

The court may make the re-payment to the mortgagee of his expenses of putting up the mortgaged property to sale, a condition of a rule to stay proceedings in the action (*Dowle* v. *Neale*, 10 W. R. 627, Ex. E. T. 1862).

The application ought to be made before executing execution against the mortgagor; but where the premises were in the possession of a tenant of the mortgagor who did not appear, and the claimant obtained judgment by default, and recovered possession, the court would have set aside the judgment and execution in order to let in the mortgagor to apply for a stay of proceedings, if the mortgagee had not consented to take what was due on the mortgage and restore possession (*Doe* d. *Tubb* v. *Roe*, 4 Taunt. 887).

In what cases the application may be made.

The provisions of this section do not apply to cases where the mortgagee is in possession (*Sutton* v. *Rawlings*, 3 Exch. 407). Upon staying proceedings, the costs are to be taxed as between

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* Where there has been an assignment of a mortgage, and a re-conveyance to the mortgagor, and then a re-mortgage to the same mortgagee, the original mortgage and the re-conveyance, as they form links in the title, should be delivered up under the usual order under this section (*Hudson* v. *Malcolm*, 10 W. R. 720, Ex. T. T. 1862).

party and party, and not as between attorney and client (*Doe* d. *Cuppe* v. *Cuppe*, 3 Bing. N. C. 768).

It may be observed that under 7 Geo. 2, c. 20, s. 1 (which is not repealed; but rather expressly preserved by s. 221, *infra*), the court will stay proceedings in an action of *covenant* on a mortgage-deed; as that statute extends to actions brought "on any bond for payment of the money secured" by the mortgage (*Smeeton* v. *Collier*, 1 Exch. 457).

Judge at chambers. A judge at chambers has jurisdiction under this section (see s. 221, *infra*; *Lawrence* v. *Hogben*, L. J. 26, Ex. 55).

See as to the jurisdiction of judges at chambers, *Smeeton* v. *Collier* (1 Exch. 457); *Clarke* v. *E. I. Company* (6 D. & L. 278); and other cases cited in note to C. L. P. A. 1860, s. 4, *post*; and now as to the jurisdiction of the masters at chambers, see stat. 30 & 31 Vict. c. 68, *post*.

Not to extend to cases where the right of redemption is controverted, or the money due not adjusted;

or to prejudice any subsequent mortgage.

220. Nothing herein contained shall extend to any case where the person against whom the redemption is or shall be prayed shall (by writing under his hand, or the hand of his attorney, agent or solicitor, to be delivered before the money shall be brought into such court of law, to the attorney or solicitor for the other side) insist, either that the party praying a redemption has not a right to redeem, or that the premises are chargeable with other or different principal sums than what appear on the face of the mortgage, or shall be admitted on the other side; or to any case where the right of redemption to the mortgaged lands and premises in question in any cause or suit shall be controverted or questioned by or between different defendants in the same cause or suit; or shall be any prejudice to any subsequent mortgage or subsequent incumbrance, anything herein contained to the contrary thereof in anywise notwithstanding.

What cause may be shown. In answer to a rule *nisi* obtained under s. 219 (*ante*, p. 172), it is sufficient to show the delivery of a notice in writing to the mortgagee, stating that the mortgagee disputes the mortgagor's right to redeem (*Filbee* v. *Hopkins*, 6 D. & L. 264). In other cases where notice may be given by the mortgagee, enough ought to be stated to enable the court (when cause is shown against the rule) to determine what the question is between the parties, and to decide whether a case for the exercise of the jurisdiction of a court of common law properly arises or not (*Doe* d. *Harrison* v. *Louch*, 6 D. & L. 270; see also *Goodtitle* v. *Pope*, 7 T. R. 185; and as to imposing terms, see *Sutton* v. *Rawlings*, 3 Exch. 407).

Jurisdiction of courts and judges.

221. The several courts and the judges thereof respectively shall and may exercise over the proceedings the like jurisdiction as heretofore exercised in the action of ejectment, so as to ensure a trial of the title, and of actual ouster, when necessary, only, and

for all other purposes for which such jurisdiction may at present be exercised; and the provisions of all statutes not inconsistent with the provisions of this act, and which may be applicable to the altered mode of proceeding, shall remain in force and be applied thereto.

See s. 218 (*ante*, p. 172).

The real defendant, though not a party to the record, may be ordered by rule to pay the cost of a successful claimant (*Hutchinson* v. *Greenwood*, 4 E. & B. 324; L. J. 24, Q. B. 2; *Thornton* v. *Wilkinson*, 11 W. R. 916; Ex. E. T. 1863).

So the real claimant may in like manner be ordered to pay the costs of a successful defendant (*Mobbs* v. *Vandenbrande*, 4 B. & S. 904; L. J. 33, Q. B. 177).

AMENDMENT.

And whereas the power of amendment now vested in the Courts and the Judges thereof is insufficient to enable them to prevent the failure of justice by reason of mistakes and objections of forms; be it enacted as follows:—

222. It shall be lawful for the superior courts of common law, and every judge thereof, and any judge sitting at nisi prius, at all times to amend all defects and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend, or not; and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made.

It is difficult to exaggerate the importance of this section, especially the last clause of it: "*All such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be made.*"

The power to amend thus committed to the judges differs much from the powers hitherto possessed by them.*

Extent of amendments to be made.

Amendments, generally speaking, had previously been of variances between the record and the evidence at the trial; and pleas, pleading too much or too little, were found against the defendant, when, if an amendment could have been made, the real question would have been tried and decided. Now "*all defects and errors*"

* A very useful *résumé* of the various statutes of Amendments and *Jeofails* will be found in the article "Amendment" in the "Imperial Cyclopædia."

are to be rectified, and to be so rectified "*at all times.*" Amendments also had been formerly made on the record where there was something in writing to amend by (*Cheese* v. *Scales*, 10 M. & W. 491). Amendments now are to be made as the matters in dispute themselves require; the amendment is to bring out "the real question in controversy between the parties;" and see *St. Losky* v. *Green* (9 C. B., N. S. 370; L. J. 30, C. P. 19).

As the allowance of amendments under this section rests entirely in the discretion of the judges, exercised upon the particular case before them, a mere recapitulation of the very numerous cases wherein amendments have been allowed or refused would serve only to display the beneficial use that has already been made of the very great power now entrusted to the courts and judges, and would prove but of little use to the practitioner. Many of these cases may be found in Roscoe's Nisi Prius, 11th ed.; the principal cases more recently decided are *Garrard* v. *Giubilei* (11 C. B., N. S. 616; L. J. 31, C. P. 131; *S. C*, in Ex. Ch., 13 C. B., N. S. 332; L. J. 31, C. P. 270), where in an action against a husband in respect of a cause of action which accrued against his wife *dum sola*, the court held that the wife could not be added as a party by way of amendment; so in *Bolingbroke and Wife* v. *Kerr* (L. R. 1 Ex. 222), where a husband and wife sued in right of the wife as administratrix, and the action ought to have been brought by the husband alone, the Court of Exchequer doubted if they could amend, and a *stet processus* was entered upon terms; *Adams* v. *Smith* (1 F. & F. 311), where Bramwell, B., refused to allow a plea of public highway to be added at Nisi Prius in an action of trespass; *Pearce* v. *Preston* (11 W. R. 35, Q. B., M. T. 1862), where, in an action which had slept for some years, and which had been revived against the executors of the defendant, leave to amend the claim and particulars by increasing the amount sought to be recovered, adding items which would be barred by the Statute of Limitations, was refused; *Roles* v. *Davis* (4 H. & N. 484), where an alleged misrepresentation of the value of a business was allowed to be amended; *Hailes* v. *Marks* (7 H. & N. 56; L. J. 30, Ex. 389), where, in an action for false imprisonment, the defendant was allowed to amend the grounds of suspicion alleged in his plea of justification; *Blake* v. *Done* (7 H. & N. 465; L. J. 31, Ex. 100), where, in ejectment brought by cestui que trust, the names of his trustees were allowed to be added (see also *Cornish* v. *Abingdon*, 1 F. & F. 562, E. T. 1862; *Ellston* v. *Deacon*, L. R., 2 C. P. 20; *Berresford* v. *Geddes*, L. R., 2 C. P. 285); *La Banca Nazionale, &c.* v. *Hamburger* (2 H. & C. 330), where a foreign bank sued in the corporate name by which it was known, and the defendants pleaded *nul tiel corporation*, the Court of Exchequer amended the writ and declaration by inserting the name of a director of the bank as nominal plaintiff, he being by the law of the country entitled to sue; and as to special cases, *Carpenter* v. *Parker* (3 C. B., N. S. 206; L. J. 27, C. P. 78); *Notman* v. *Anchor Assurance Company* (6 C. B., N. S. 536); *Mersey Docks* v. *Jones* (L. J. 29, C. P. 239); *Pennington* v. *Cardale* (10 W. R. 544, Ex., E. T. 1862).

The act contains no provisions for substituting one plaintiff for another, one suing in a representative capacity for a dead man who never was a party to the proceedings (*per* Kelly, C. B., *Clay* v. *Oxford*, L. R. 2 Ex. 54). In a case in which a local board of

health was sued, as such, instead of in the name of their clerk as provided by the statute, M. Smith, J., held that he had no power to make the amendment at the trial (*Pryor* v. *Local B. of Health of W. Ham*, 15 L. T., N. S. 250); so where in an action by the lessor against the lessee for breaches of covenants in a lease, the defendant pleaded that the plaintiff had before suit assigned his reversion to a third party, *A. B.*; the plaintiff having, in fact, mortgaged his estate; Crompton, J., at chambers, refused to amend the writ and all subsequent proceedings by inserting the name of *A. B.* instead of the plaintiff (*ex rel. am.*, 1864).

In an action in which after judgment had been signed by the plaintiff, the defendant brought error in fact, on the ground that he was an infant and had appeared by attorney, the court held that they had no power to amend the proceedings by alleging, contrary to the fact, an appearance by guardian; but they ordered the proceedings subsequent to appearance to be set aside and the defendant to appear by guardian within six days (*Carr* v. *Cooper*, 1 B. & S. 230).

Several instances are given in this book of amendments of particular proceedings; and it will be therefore sufficient here to add that this section has been applied to proceedings in mandamus (*Reg.* v. *Derbyshire, &c., Railway Company*, 3 E. & B. 784; L. J. 23, Q. B. 333), and that it does not apply to proceedings before sheriffs; or other persons presiding at trials of issues under 3 & 4 Will. 4, c. 42, nor to proceedings in inferior courts (*Wickes* v. *Grove*, 2 Jur., N. S. 212; Ex. H. T. 1856), nor to proceedings made specially amenable under particular sections of this act (*Wickens* v. *Steel*, 2 C. B., N. S. 488; L. J. 26, C. P. 24; *Holden* v. *Ballantyne*, L. J. 29, Q. B. 148; *Garrard* v. *Giubilei*, 11 C. B., N. S. 616, and in Exch. Ch., 13 C. B., N. S. 832).

It may be remarked here generally, that all amendments ought to be in furtherance of justice (*Rex* v. *Grampound, Mayor of*, 7 T. R. 699); though an amendment was refused in an action against an attorney for practising without being enrolled (*Matthews* v. *Swift*, 3 Dowl. 636; see also *Brennan* v. *Howard*, 1 H. & N. 138; but see *per* Crowder, J., in *Hughes* v. *Bury*, 1 F. & F. 374). Amendments may be made in penal, as in other actions (*Jones* v. *Edwards*, 3 M. & W. 318).

While all such amendments will be made as are necessary for the determination of the real questions in dispute, the courts will not allow amendments to be made so as to try questions not previously intended to be raised by the parties (*Wilkin* v. *Reed*, 15 C. B. 192; *Cawkwell* v. *Russell*, L. J. 26, Ex. 34; *Lucas* v. *Tarleton*, 3 H. & N. 116).

But no amendment will be allowed so as to prejudice the other party, and hereon it may be well to cite the observations of the Court of Exchequer in *Bradworth* v. *Foshaw* (10 W. R. 760, Ex. T. T. 1862):—"The plaintiff ought at first to state his cause of action, if there was one, truly and in substance according to the facts, in order that the defendant may know whether he should demur, admitting the facts, or go to trial, denying them. It would be better that there should be no trial at all, than that a plaintiff should be allowed to state one cause of action, and then, on any difficulty arising as to his maintaining it on the evidence, to amend so as to raise another and different cause of action. It would be far better to require no pleadings at all, than to allow pleadings which could only operate as a snare." See also *Riley, Executrix*, v. *Baxendale* (6 H. & N. 445; L. J. 30, Ex. 87).

But a new trial will not be directed upon the ground of surprise occasioned by an amendment at Nisi Prius, unless substantial injustice has been done (*White* v. *The South Eastern Railway Company*, 10 W. R. 564, Ex. E. T. 1862).

The courts are very unwilling to disturb decisions of judges made in the exercise of discretion vested in them (*Morgan* v. *Pike*, 14 C. B. 473; *Brennan* v. *Howard*, *ubi supra*; and *Schuster* v. *Wheelwright*, 8 C. B., N. S. 383; L. J. 29, C. P. 222). In *Martyn* v. *Williams* (1 H. & N. 817; L. J. 26, Ex. 117), the court disallowed an amendment made at the trial, on the ground that the amendment made the pleading reasonably open to a demurrer; but such amendments are now sometimes made, the other party having leave given him to demur.

In a case where a verdict was entered for the plaintiff at the trial and the defendant obtained rules to enter a nonsuit pursuant to leave reserved and to arrest the judgment, and the court discharged the rules giving the plaintiff leave to amend his declaration according to the facts proved at the trial if error or an appeal should be brought, the Court of Exchequer Chamber on an appeal being brought, held that they could look only at the amended record (*Indermaur* v. *Dames*, L. J. 36, C. P. 181; *Tetley* v. *Wanless*, L. R. 2, Ex. 279, following *Mellish* v. *Richardson*, 1 Cl. & Fin. 224).

When to apply for leave to amend.

Applications to amend ought to be made within a reasonable time (*Wood* v. *Grimwood*, 10 B. & C. 689). The terms are generally such that the party objecting is not prejudiced by the amendment; thus upon amendment of a declaration, even at *Nisi Prius*, a defendant may be allowed to pay money into court (*Robson* v. *Turnbull*, 1 F. & F. 365); so also upon amending particulars of demand. The amendment is ordinarily allowed only "on payment of costs" (*Wall* v. *Lyon*, 9 Bing. 411), which condition must be fulfilled, or the party's further proceedings will be set aside as irregular (*Levy* v. *Drew*, 5 D. & L. 387; but see p. 41, *ante*). The order to amend may be acted upon, or abandoned (*Pugh* v. *Kerr*, 5 M. & W. 164). If served or acted upon, the party obtaining it is bound by its terms (*Giraud* v. *Austin*, 9 Q. B. 802).

Costs.

Special provision should, in cases of amendment, be made as to the costs of the cause; as R. G., H. T. 1853, r. 12, *post*, would hardly meet the merits; see *Harold* v. *Smith* (5 H. & N. 381; L. J. 29, Ex. 141).

Application to amend (like those to set side proceedings), may be made to the court or to a judge.

See also as to amendment, C. L. P. A. 1854, s. 96; C. L. P. A. 1860, s. 36, *post*.

Power to Judges to make Rules, and frame Writs and Proceedings.

And in order to enable the Courts and Judges to carry this act thoroughly into effect, and to enable them from time to time to make rules and regulations and to frame writs and proceedings for that purpose, be it enacted as follows:—

General rules may be made by the judges.

223. It shall be lawful for the judges of the said court, or any eight or more of them, of whom the

chiefs of each of the said courts shall be three, from time to time to make all such general rules and orders for the effectual execution of this act, and of the intention and object hereof, and for fixing the costs to be allowed for and in respect of the matters herein contained, and the performance thereof, and for apportioning the costs of issues, and for the purpose of enforcing uniformity of practice in the allowance of costs in the said courts, and of ensuring as far as may be practicable an equal division of the business of taxation amongst the masters of the said courts, as in their judgment shall be necessary or proper, and for that purpose to meet from time to time as occasion may require: and it shall further be lawful for the judges of the said courts, or any eight or more of them, of whom the chiefs of each of the said courts shall be three, from time to time to exercise all the powers and authority given to them by an act of parliament passed in the session of parliament held in the thirteenth and fourteenth years of the reign of her present Majesty, intituled "*An Act to enable the Judges of the Common Law at Westminster to alter the Forms of Pleading*," with respect to any matter herein contained relative to practice or pleading, anything in this act to the contrary notwithstanding: and the provisions of the said last-mentioned act as to the rules, orders or regulations made in pursuance thereof shall be held applicable to any rules, orders or regulations which shall be made in pursuance of this act: provided that nothing herein contained shall be construed to restrain the authority or limit the jurisdiction of the said courts or the judges thereof to make rules or orders, or otherwise to regulate and dispose of the business therein.

13 & 14 Vict c. 16.

See R. G., H. T. 1853, *post*.
See the Mercantile Law Amendment Act, 1856, s. 15, *post*.

224. Such new or altered writs and forms of proceedings may be issued, entered and taken, as may by the judges of the said courts, or any eight or more of them, of whom the chiefs of each of the said courts shall be three, be deemed necessary or expedient for giving effect to the provisions hereinbefore contained, and in such forms as the judges of such courts respectively shall from time to time think fit to order; and such writs and proceedings shall be acted upon and enforced in such and the same manner as writs and proceedings of the said courts are now acted upon

New forms of writs and other proceedings.

and enforced, or as near thereto as the circumstances of the case will admit; and any existing writ or proceeding, the form of which shall be in any manner altered in pursuance of this act, shall nevertheless be of the same force and virtue as if no alteration had been made therein, except so far as the effect thereof may be varied by this act.

See the Mercantile Law Amendment Act, 1856, s. 15, *post*.

Rules may be made by each court for government of its officers.

225. It shall and may be lawful to and for the judges of each of the said courts from time to time to make such rules and orders for the government and conduct of the ministers and officers of their respective courts, in and relating to the distribution and performance of the duties and business to be done and performed in the execution of this act, as such judges may think fit and reasonable: provided always, that no additional charge be thereby imposed on the suitors.

This and the preceding sections have been acted upon; see Rules of Court, and Forms of Proceedings, *post*.

Effect of Injunction.

And whereas it is expedient that injunctions and orders to stay proceedings should be rendered more effectual, be it enacted as follows:—

Injunctions and orders to stay proceedings to have a specific effect.

226. In case any action, suit or proceeding in any court of law or equity shall be commenced, sued, or prosecuted, in disobedience of and contrary to any writ of injunction, rule or order of either of the superior courts of law or equity at Westminster, or of any judge thereof, in any other court than that by or in which such injunction may have been issued, or rule or order made, upon the production to any such other court or judge thereof of such writ of injunction, rule or order, the said other court (in which such action, suit or proceeding may be commenced, prosecuted or taken), or any judge thereof, shall stay all further proceedings contrary to any such injunction, rule or order; and thenceforth all further and subsequent proceedings shall be utterly null and void to all intents and purposes: provided always that nothing herein contained shall be held to diminish, alter, abridge or vary the liability of any person or persons commencing, suing or prosecuting any such action, suit or proceeding contrary to any injunction, rule or

order of either of the courts aforesaid, to any attachment, punishment, or other proceeding to which any such person or persons are, may, or shall be liable in cases of contempt of either of the courts aforesaid, in regard to the commencement, suing or prosecuting such action, suit or proceeding.

A plaintiff might formerly have gone on with his action at law, notwithstanding an injunction restraining him from so doing. His proceedings were quite regular (*Horne* v. *Tooke*, 2 Dowl. 776); the only risk he ran was that of an attachment for contempt, by the court which issued the injunction. Any such proceeding is now a nullity, and the party proceeding is still exposed to punishment for his contempt.

When a court of equity has issued an order for an injunction restricting a party from bringing an action, this court will enforce such order by staying proceedings, although no writ of injunction has been actually issued (*Cobbett* v. *Ludlam*, 11 Exch. 446).

Of proceedings in Equity generally, the Courts of Common Law still take no notice (*Simpson* v. *Sadd*, 16 C. B. 26; L. J. 24, C. P. 156).

It is no ground for staying proceedings here, that proceedings are pending between the parties for the same cause of action in a foreign court (*Cox* v *Mitchell*, 7 C. B., N. S. 55; L. J. 29, C. P. 33).

See, as to right of defendant to proceed under s. 101 (*ante*, p. 92), where plaintiff elects to proceed in equity, *Mortimore* v. *Soares* (1 E. & E. 399; L. J. 28, Q. B. 133).*

As to staying proceedings under 21 & 22 Vict. c. 60, s. 6 (Joint Stock Companies Amendment Act, 1858) see *Lanyon* v. *Smith* (3 B. & S. 938).

INTERPRETATION OF TERMS.

And be it enacted as follows:—

227. In the construction of this act the word "court" shall be understood to mean any one of the superior courts of common law at Westminster in which any action is brought; and the word "judge" shall be understood to mean a judge or baron of any of the said courts;" and the word "master" shall be understood to mean a master of any of the said courts; and the word "action" shall be understood to mean any personal* action brought by writ of summons in any of the said courts; and no part of the united kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, or Sark, nor any islands adjacent to any of them, being part of the dominions of her Majesty, shall be deemed to be "beyond the

* The old action of ejectment was a personal action, but the present action of ejectment is not.

seas" within the meaning of this act: and wherever in this act, in describing or referring to any person or party, matter or thing, any word importing the singular number or masculine gender is used, the same shall be understood to include and shall be applicable to several persons and parties as well as one person or party, and females as well as males, and bodies corporate as well as individuals, and several matters and things as well as one matter or thing, unless it otherwise be provided, or there be something in the subject or context repugnant to such construction.

As to the construction of the word "action" see ss. 42, 80, 81, 135, and notes (*ante*, pp. 49, 79, 80, 115).

The provision that no part of Great Britain, &c., shall be beyond the seas, refers to the solitary instance of bringing error under s. 147 (*ante*, p. 126).

See other interpretation clauses, C. L. P. A. 1854, s. 99; and C. L. P. A. 1860, s. 39, *post*.

Extension of Act.

Her majesty may direct all or part of this act to extend to any court of record.

228. It shall be lawful for her Majesty from time to time, by an order in council, to direct that all or any part of the provisions of this act or of the rules to be made in pursuance thereof shall apply to all or any court or courts of record in England or Wales, and within one month after such order shall have been made and published in the *London Gazette* such provisions and rules respectively shall extend and apply in manner directed by such order; and any such order may be in like manner from time to time altered or annulled.

See similar provisions in C. L. P. A. 1854, s. 105; and C. L. P. A. 1860, s. 44, *post*.

See *Dawber* v. *Barnes* (L. J. 31, Q. B. 302), as to the construction to be put upon the application of this and similar acts, and of the rules of the superior courts, when extended to inferior courts under this and similar sections.

Certain of the provisions of this act to extend and apply to the Court of Common Pleas at Lancaster and the Court of Pleas at Durham.

229. And whereas it is expedient to apply the provisions of this act, with the requisite modifications, to the superior courts of the counties palatine of Lancaster and Durham respectively: all the enactments and provisions of this act with respect to writs for the commencement of personal actions, except such as relate to the teste thereof in the name of a judge, to concurrent writs, and to the service of writs elsewhere than in the counties palatine of Lancaster and Durham respectively, and proceedings against parties re-

siding out of the jurisdiction of the said courts; and all the provisions of this act with respect to the appearance of the defendant and proceedings of the plaintiff in default of appearance; and with respect to the joinder of parties to actions and joinder of causes of action; and with respect to the determination of questions raised by consent of the parties without pleading; and with respect to the language and form of pleadings, and provisions as to pleadings, profert, oyer, setting out of documents; and with regard to the time and manner of declaring; and as to pleas and subsequent pleadings, and incident thereto; and examples and forms of pleading and causes of action; and with respect to judgment by default, and the mode of ascertaining the amount to be recovered thereupon and incident thereto; and all the provisions of this act with respect to juries and jury process; and with respect to the admission of documents; and with respect to the expenses of execution and the remaining in force and renewal of execution, the discharging of parties from execution, and charging in execution persons in prison; and with respect to proceedings for the revival of judgments and other proceedings by and against persons not parties to the record; and with respect to the effect of death, marriage and bankruptcy upon the proceedings in an action; and with respect to the proceedings upon motions to arrest the judgment and for judgment *non obstante veredicto;* and with respect to proceedings in error subject to the proviso hereinafter contained; and all the provisions of this act with respect to the action of ejectment, and incident thereto; and with respect to the power of amendment by courts and the judges thereof, shall extend and apply to the Court of Common Pleas at Lancaster and the Court of Pleas at Durham, and actions and proceedings therein respectively.

See C. L. P. A. 1854, s. 100; and C. L. P. A. 1860, s. 40, *post.*

Powers given by this act to the judges of the Superior Courts at Westminster to make rules, &c., may be exercised by judges of the Court of Common Pleas at

230. All the powers given by this act to the judges of the said superior courts at Westminster to make rules and regulations for the execution of this act, and to frame writs and proceedings for that purpose; and to the judges of the said respective courts to make rules or orders for the government and conduct of the ministers and officers thereof; and all other powers by this act given to or vested in the judges of the said superior courts at Westminster to be exercised by

Lancaster and Court of Pleas at Durham as to those courts.

more than one of them, except the powers and authority given by the said act of parliament passed in the session of parliament held in the thirteenth and fourteenth years of the reign of her present Majesty, intituled "*An Act to enable the Judges of the Courts of Common Law at Westminster to alter the Forms of Pleading*," shall and may be exercised by the respective judges of the said Court of Common Pleas at Lancaster and Court of Pleas at Durham, being judges of one of the said common law courts at Westminster, or any two of them, with respect to the said Court of Common Pleas at Lancaster and Court of Pleas at Durham respectively, and the ministers and officers thereof, and matters and proceedings therein, within the jurisdiction of the same courts respectively; and all powers under this act exercisable by any one judge of the superior courts at Westminster, shall and may be exercisable by one judge of the said superior courts of the said counties palatine, being also a judge of one of the said courts at Westminster, as to matters and proceedings in the said superior courts of the said counties palatine.

See C. L. P. A. 1854, s. 100; and C. L. P. A. 1860, s. 40, *post*.

Judges may make rules for applying other provisions of this act to Court of Common Pleas at Lancaster and Court of Pleas at Durham.

231. It shall and may be lawful to and for the judges of each of the said Courts at Common Pleas at Lancaster and Pleas at Durham, being judges of one of the superior courts at Westminster, or any two of them, from time to time to make rules and orders for applying any of the other provisions of this act to the said respective superior courts of the said counties palatine, and matters and proceedings therein and parties thereto, with such modifications and alterations with reference to the constitution and peculiar circumstances of such court as they may think fit and reasonable; and for modifying any of the provisions hereby applied to such last-mentioned courts respectively with reference to such constitution and peculiar circumstances; and from time to time to rescind, amend, or alter such rules or orders; and that such rules or orders, subject to such power of rescission, amendment and alteration, shall have the same force as if the same were made by and embodied in this act.

See C. L. P. A. 1854, s. 100; and C. L. P. A. 1860, s. 40, *post*.

Provisions to apply to

232. Provided always, that all the provisions of

this act applicable to masters of the said courts at Westminster shall apply to the respective prothonotaries of the Court of Common Pleas at Lancaster and Court of Pleas at Durham, and their respective deputies, who may singly exercise with reference to matters and proceedings in the said last-mentioned courts respectively, the powers hereby given to any one or more of the masters of the superior courts at Westminster; and that such respective officers shall record the proceedings of trials of causes depending in the said respective courts, and draw up and return *posteas* on records from the superior courts at Westminster, tried in the said counties palatine respectively, and officiate at the trial of such causes therein as heretofore.

Masters of Courts at Westminster, to apply to prothonotaries of Court of Common Pleas at Lancaster and Court of Pleas at Durham, and their Deputies, &c.

See C. L. P. A. 1854, s. 101; and C. L. P. A. 1860, s. 41.

233. Provided also, as to proceedings in error, that the Court of Queen's Bench shall still be the court of error from the said Court of Common Pleas at Lancaster and Court of Pleas at Durham; and that it shall be sufficient to transmit to the said Court of Queen's Bench a transcript of the record of any judgment or proceedings in those courts on which error is alleged; and that the judgment of the Court of Queen's Bench thereon shall be certified by one of the masters of the said Court of Queen's Bench on the said transcript, or by rule of court, as the said court may direct; and that thereupon such judgment shall be entered on the original record in the said respective Courts of Common Pleas at Lancaster and Pleas at Durham; and such further proceedings as may be necessary thereon shall be awarded by the said respective courts, subject to the right of either party to allege errors in the said judgment in the said Court of Queen's Bench, and proceed thereon as provided by this act in the case of errors alleged in actions depending in that court.

As to proceedings in error.

Compare C. L. P. A. 1854, s. 102; and C. L. P. A. 1860, s. 42.

234. From the time when this act shall commence and take effect so much of a certain act of parliament passed in the fifth year of the reign of his late Majesty King William the Fourth, intituled, "*An Act for improving the Practice and Proceedings in the Court of Common Pleas of the County Palatine of Lancaster*," and so much of a certain other act of parlia-

Certain provisions of 4 & 5 Will. 4, c. 62, and 2 & 3 Vict. c. 16, repealed.

ment passed in the second year of the reign of her present Majesty, intituled, "*An Act for improving the Practice and Proceedings of the Court of Pleas of the County Palatine of Durham and Sadberge,*" as relate to the duration of writs; and to alias and pluries writs, and to the proceedings necessary for making the first writ in any action available to prevent the operation of any statute whereby the time for the commencement of any action may be limited, shall be repealed, except so far as may be necessary for supporting any writs that have been issued before the commencement of this act, and any proceedings taken or to be taken thereon; but that the other provisions of the said last-mentioned acts of parliament, so far as they are not altered by or inconsistent with the provisions of this act, shall remain in force.

Short title of act.

235. In citing this act in any instrument, document, or proceeding, it shall be sufficient to use the expression "The Common Law Procedure Act, 1852."

Act not to extend to Ireland or Scotland.

236. Nothing in this act shall extend to Ireland or Scotland, except in the cases herein specially mentioned.

SCHEDULE (A.) referred to in the foregoing Act.

No. 1.

Writ where the Defendant resides within the Jurisdiction.

VICTORIA, by the grace of God, *&c.*

To *C. D.*, of , in the county of .

We command you, that within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in our court of , in an action at the suit of *A. B.*; and take notice, that in default of your so doing the said *A. B.* may proceed therein to judgment and execution. Witness, *&c.*

Memorandum to be subscribed on the Writ.

N.B.—This writ is to be served within (*six*) calendar months from the date thereof, or, if renewed, from the date of such renewal, including the day of such date, and not afterwards.

Indorsement to be made on the Writ, before Service thereof.

This writ was issued by *E. F.*, of , attorney for the said plaintiff, *or* this writ was issued in person by *A. B.*, who resides at [*mention the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such*].

Indorsement to be made on the Writ, after Service thereof.

This writ was served by *X. Y.* on *L. M.* [the defendant *or* one of the defendants] on *Monday* the day of 18 .

(Signed) *X. Y.*

No. 2.

Writ where the Defendant, being a British Subject, resides out of the Jurisdiction.

VICTORIA, by the grace of God, *&c.*

To *C. D.*, of , in the county of .

We command you, that within [*here insert a sufficient number of days within which the defendant might appear, with reference to the distance he may be at from England*] days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in our court of , in an action at the suit of *A. B.*; and take notice, that in default of your so doing the said *A. B.* may, by leave of the court or a judge, proceed therein to judgment and execution. Witness, *&c.*

Memorandum to be subscribed on the Writ.

N.B.—This writ is to be served within (*six*) calendar months from the date thereof, or, if renewed, from the date of such renewal, including the day of such date, and not afterwards.

Indorsement to be made on the Writ before the Service thereof.

This writ is for service out of the jurisdiction of the court, and was issued by *E. F.*, of , attorney for the said plaintiff, *or* this writ was issued in person by *A. B.*, who resides at [*mention the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such*].

The indorsement required by the 8th section should be made on this writ, but should allow the defendant the time limited for appearance to pay the debt and costs.

No. 3.

Writ where the Defendant, not being a British Subject, resides out of the Jurisdiction.

VICTORIA, by the grace of God, &c.

To *C. D.*, late of , in the county of .

We command you that within [*here insert a sufficient number of days within which the defendant might appear, with reference to the distance he may be at from England*] days after notice of this writ is served on you, inclusive of the day of such service, you do cause an appearance to be entered for you in our court of , in an action at the suit of *A. B.*; and take notice, that in default of your so doing the said *A. B.* may, by leave of the court or a judge, proceed therein to judgment and execution. Witness, &c.

Memorandum to be subscribed on the Writ.

N.B.—Notice of this writ is to be served within (*six*) calendar months from the date thereof, including the day of such date, and not afterwards.

Indorsement as in other cases.

Notice of the foregoing Writ.

To *G. H.*, late of [*Brighton, in the county of Sussex*] *or* now residing at [*Paris, in France*].

Take notice, that *A. B.*, of , in the county of , England, has commenced an action at law against you *C. D.* in Her Majesty's Court of Queen's Bench, by a writ of that court, dated the day of A.D. 18 ; and you are required, within days after the receipt of this notice, inclusive of the day of such receipt, to defend the said action, by causing an appearance to be entered for you in the said court to the said action; and in default of your so doing the said *A. B.* may, by leave of the court or a judge, proceed thereon to judgment and execution.

[*Here state amount of claim as required by 8th section, but allowing the defendant the time limited for appearance* to pay debt and costs.*]

(Signed) *A. B.*, of &c.
or
E. F., of &c.
Attorney for *A. B.*

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* Where the notice gave the defendant, a foreigner, a less time than the time limited for appearance in which to pay the debt and costs, the Court of Common Pleas refused to give the plaintiff leave to proceed, although the defendant had by letter admitted the debt (*Galli* v. *Mongruel*, L. R., 1 C. P. 46).

No. 4.

Special Indorsement.

[*After the indorsement required by the 8th section of this act, this special indorsement may be inserted.*]

The following are the particulars of plaintiff's claim:

	£	s.	d.
1849.—June 20. Half-year's rent to this day of house and premises in street, Westminster	25	10	0
Sept. 12. Ten sacks of flour at 40*s*. .	20	0	0
Dec. 1. Money received by defendant	17	0	0
	62	10	0
Paid	15	0	0
Balance due . . .	£47	10	0

Or,

To butcher's meat supplied between the 1st of January, 1849, and the 1st of January, 1850 . . . £52

Paid 20

Balance £32

[*If any account has been delivered, it may be referred to, with its date, or the plaintiff may give such a description of his claim as in a particular of demand, so as to prevent the necessity of an application for further particulars.*]

Or,

£50 principal and interest due on a bond dated the day of , conditioned for the payment of £100.

Or,

£90 principal and interest due on a covenant contained in a deed dated the day of , to pay £100 and interest.

Or,

A penalty of £100 under the statute 55 Geo. 3, c. 137.

Or,

£85 on a bill of exchange for £100, dated the 2nd February, 1849, accepted *or* drawn, *or* indorsed by the defendant.

Or,

£50 on a guarantee dated the 1st of January, 1850, whereby the defendant guaranteed the due payment by *E. F.* of goods supplied or to be supplied to him.

[*To any of the above may be added, in cases where interest is payable,* "the plaintiff also claims interest on £ of the above sum from the date of the writ until judgment."]

N.B.—Take notice that if a defendant served with this writ within the jurisdiction of the court do not appear according to the exigency thereof, the plaintiff will be at liberty to sign final judgment for any sum not exceeding the sum above claimed [with interest

at the rate specified], and the sum of £ for costs, and issue execution at the expiration of eight days from the last day for appearance.

No. 5.

In the Queen's Bench:

On the day of A.D. 1850.

[*Day of signing the Judgment.*]

England, to wit. } *A. B.* in his own person [*or* by his attorney] sued out a writ of summons against *C. D.*, indorsed according to the "Common Law Procedure Act, 1852," as follows:

[*Here copy Special Indorsement.*]

And the said *C. D.* has not appeared: therefore it is considered that the said *A. B.* recover against the said *C. D.* £ , together with £ for costs of suit.

No. 6.

In the Queen's Bench:

The day of in the year of our Lord 18 .

Yorkshire, to wit. } Whereas *A. B.* has sued *C. D.*, and affirms, and denies.

[*Here state the question or questions of fact to be tried.*]

And it has been ordered by the Hon. Mr. Justice according to the "Common Law Procedure Act, 1852," that the said question shall be tried by a jury: therefore let the same be tried accordingly.

No. 7.

Form of Rule or Summons where a Judgment Creditor applies for Execution against a Judgment Debtor.

[*Formal parts as at present.*]

C. D. show cause why *A. B.* [*or as the case may be*] should not be at liberty to enter a suggestion upon the roll in an action wherein the said *A. B.* was plaintiff and the said *C. D.* was defendant, and wherein the said *A. B.* obtained judgment for £ against the said *C. D.* on the day of , that it manifestly appears to the court that the said *A. B.* is entitled to have execution of the said judg-

ment, and to issue execution thereupon, and why the said *C. D.* should not pay to the said *A. B.* the costs of this application to be taxed.

[*Note.—The above form may be modified so as to meet the case of an application by or against the representative of a party to the judgment.*]

No. 8.

Form of Suggestion that the Judgment Creditor is entitled to Execution against the Judgment Debtor.

And now on the day of it is suggested and manifestly appears to the court, that the said *A. B.* [*or C. D.*, as executor of the last will and testament of the said *A. B.*, deceased, *or as the case may be*] is entitled to have execution of the judgment aforesaid against the said *E. F.* [*or* against *G. H.*, as executor of the last will and testament of the said *E. F.*, *or as the case may be*]: therefore it is considered by the court that the said *A. B.* [*or C. D.*, as such executor as aforesaid, *or as the case may be*] ought to have execution of the said judgment against the said *E. F.* [*or* against *G. H.*, as such executor as aforesaid, *or as the case may be*].

No. 9.

Form of Writ of Revivor.

Victoria, by the grace of God, *&c.*, to *E. F.*, of , greeting.

We command you that, within eight days after the service of this writ upon you, inclusive of the day of such service, you appear in our court of to show cause why *A. B.* [*or C. D.*, as executor of the last will and testament of the said *A. B.*, deceased, *or as the case may be*] should not have execution against you [*if against a representative, here insert* as executor of the last will and testament of deceased, *or as the case may be*] of a judgment whereby the said *A. B.* [*or as the case may be*] on the day of in the said court recovered against you [*or as the case may be*] £ ; and take notice, that in default of your so doing the said *A. B.* [*or as the case may be*] may proceed to execution.

Witness, *&c.*

No. 10.

In the Queen's Bench:

The day of in the year of our Lord 18 .

[*The day of lodging note of error.*]

A. B. and *C. D.*

The plaintiff [*or* defendant] says that there is error in law in the record and proceedings in this action; and the defendant [*or* plaintiff] says that there is no error therein.

(Signed) *A. B.*, plaintiff.
[*or C. D.*, defendant.]
[*or E. F.*, attorney for plaintiff *or* defendant]

No. 11.

The day of in the year of our Lord 18 .

[*The day of making the entry on the roll.*]

The plaintiff [*or* defendant] says that there is error in the above record and proceedings, and the defendant [*or* plaintiff] says there is no error therein.

No. 12.

In the Queen's Bench:

The day of , in the year of our Lord 18 .

[*The day of lodging note of error.*]

A. B. and *C. D.* in error.

The plaintiff [*or* defendant] says that there is error in fact in the record and proceedings in this action, in the particulars specified in the affidavit hereunto annexed.

(Signed) *A. B.*, plaintiff.
[*or C. D.*, defendant.]
[*or E. F.*, attorney for plaintiff *or* defendant.]

No. 13.

EJECTMENT.

Form of Writ.

VICTORIA, *&c.*, to *X. Y. Z.*, and all persons entitled to defend the possession of [*describe the property with reasonable certainty*] in the parish of , in the county of , to the possession whereof *A. B.* and *C.*, some or one of them,

claim to be [*or* to have been on and since the day of , A.D.] entitled, and to eject all other persons therefrom: these are to will and command you, or such of you as deny the alleged title, within sixteen days after service hereof, to appear in our court of to defend the said property, or such part thereof as you may be advised; in default whereof judgment may be signed, and you turned out of possession.

Witness, *&c.*

No. 14.

Judgment in Ejectment in case of Non-appearance.

In the Queen's Bench:

The day of , 18 .

[*Date of Writ.*]

Lancashire, to wit. } On the day and year above written, a writ of our Lady the Queen issued forth of this court in these words; that is to say,

VICTORIA, by the grace of God [*here copy the writ*]; and no appearance has been entered or defence made to the said writ: therefore it is considered that the said [*here insert the names of the persons in whom title is alleged in the writ*] do recover possession of the land in the said writ mentioned, with the appurtenances.

No. 15.

In the Queen's Bench:

On the day of , A.D. 18 .

Cumberland, to wit. } On the day and year above written, a writ of our Lady the Queen issued forth of this court, in these words; that is to say,

VICTORIA, by the grace of God [*here copy the writ*]; and *C. D.* has, on the day of , appeared by , his attorney [*or* in person], to the said writ, and has defended for a part of the land in the writ mentioned; that is to say [*here state the part*], and no appearance has been entered or defence made to the said writ, except as to the said part: therefore it is considered that the said *A. B.* [*the claimant*] do recover possession of the land in the said writ mentioned, except the said part, with the appurtenances, and that he have execution thereof forthwith; and as to the rest, let a jury come, *&c.*

No. 16.

In the Queen's Bench:

On the day of , A.D. 18 .

Cumberland, } On the day and year above written, a writ of
to wit. } our Lady the Queen issued forth of this court, in these words; that is to say,

VICTORIA, by the grace of God [*here copy the writ*]; and *C. D.* has, on the day of , appeared by , his attorney [*or* in person], to the said writ; and defended for the whole of the land therein mentioned: therefore let a jury come, *&c.*

No. 17.

Afterwards, on the day of , A.D. , before and , justices of our Lady the Queen assigned to take the assizes in and for the within county, come the parties within mentioned; and a jury of the said county being sworn to try the matters in question between the said parties, upon their oath say, that *A. B.* [*the claimant*] within mentioned, on the day of , A.D. , was, and still is, entitled to the possession of the land within mentioned, as in the writ alleged: therefore, *&c.*

No. 18.

In the Queen's Bench:

On the day of , 18 .

[*Date of Writ.*]

Lancashire, } On the day and year above written, a writ of
to wit. } our Lady the Queen issued forth of this court, in these words; that is to say,

VICTORIA, by the grace of God [*here copy the writ*]; and *C. D.* has, on the day of appeared by his attorney [*or* in person] to the said writ, and *A. B.* has discontinued the action: therefore it is considered that the said *C. D.* be acquitted, and that he recover against the said *A. B.* £ for his costs of defence.

No. 19.

In the Queen's Bench:
The day of , 18 .
[*Date of Writ.*]

Lancashire, to wit. } On the day and year above written, a writ of our Lady the Queen issued forth of this court, in these words; that is to say,

VICTORIA, by the grace of God [*here copy the writ*]; and *C. D.* has, on the day of appeared by his attorney [*or* in person] to the said writ, and *A. B.* has failed to proceed to trial, although duly required so to do: therefore it is considered that the said *C. D.* be acquitted, and that he recover against the said *A. B.* £ for his costs of defence.

No. 20.

In the Queen's Bench:
The day of 18 .
[*Date of Writ.*]

Lancashire, to wit. } On the day and year above written, a writ of our Lady the Queen issued forth of this court, in these words; that is to say,

VICTORIA, by the grace of God [*here copy the writ*]; and *C. D.* has, on the day of appeared by his attorney [*or* in person] to the said writ, and the said *C. D.* has confessed the said action [*or* has confessed the said action as to part of the said land, that is to say, *here state the part*]: therefore it is considered that the said *A. B.* do recover possession of the land in the said writ mentioned [*or* of the said part of the said land], with the appurtenances, and £ for costs.

No. 21.

In the Queen's Bench:
The day of A. D. 18 .
[*Date of Writ.*]

Yorkshire, to wit. } On the day and year above written, a writ of our Lady the Queen issued forth of this court, with a notice thereunder written, the tenor of which writ and notice follows in these words; that is to say,

[*Here copy the Writ and Notice, which latter may be as follows:*]

"Take notice, that you will be required, if ordered by the court or a judge, to give bail by yourself and two sufficient

sureties, conditioned to pay the costs and damages which shall be recovered in this action."

And *C. D.* has appeared by his attorney [*or* in person] to the said writ, and has been ordered to give bail, pursuant to the statute, and has failed so to do: therefore it is considered that the said [*here insert name of landlord*] do recover possession of the land in the said writ mentioned, with the appurtenances, together with £ for costs of suit.

SCHEDULE (B.)

FORMS OF PLEADINGS.*

STATEMENTS OF CAUSES OF ACTION.

On Contracts.

Goods sold. 1. Money payable by the defendant to the plaintiff for [*these words* money payable, *&c., should precede money counts like* 1 *to* 14, *but need only be inserted in the first*] goods bargained and sold by the plaintiff to the defendant.

Work and materials. 2. Work done and materials provided by the plaintiff for the defendant at his request.

Money lent. 3. Money lent by the plaintiff to the defendant.

Money paid. 4. Money paid by the plaintiff for the defendant at his request.

Money received. 5. Money received by the defendant for the use of the plaintiff.

Account stated. 6. Money found to be due from the defendant to the plaintiff on accounts stated between them.

For an estate sold 7. A messuage and lands sold and conveyed by the plaintiff to the defendant.

For goodwill. 8. The goodwill of a business of the plaintiff, sold and given up by the plaintiff to the defendant.

For the use of a house and land. 9. The defendant's use, by the plaintiff's permission, of messuages and lands of the plaintiff.

For the use of a fishery. 10. The defendant's use, by the plaintiff's permission, of a fishery of the plaintiff.

For copyhold fines. 11. Fines payable by the defendant as tenant of customary tenements of the manor of to the plaintiff as lord

* See ss. 49—91, and notes (*ante*, pp. 51—86).

of the said manor, for the admission of the defendant into the said customary tenements.

12. The hire of [*as the case may be*] by the plaintiff let to hire to the defendant. For hire of goods, &c.

13. Freight for the conveyance by the plaintiff for the defendant at his request of goods in ships. For freight.

14. The demurrage of a ship of the plaintiff kept on demurrage by the defendant. For demurrage.

15. That the defendant, on the day of A.D., by his promissory note, now over-due, promised to pay to the plaintiff £ *two* months after date, but did not pay the same. Payee against maker of note.

16. That one *A.* on, &c. [*date*], by his promissory note now over-due, promised to pay to the defendant, or order, £ [*two*] months after date; and the defendant indorsed the same to the plaintiff; and the said note was duly presented for payment, and was dishonoured, whereof the defendant had due notice, but did not pay the same. Indorsee against indorser of note.

17. That the plaintiff, on, &c. [*date*], by his bill of exchange, now over-due, directed to the defendant, required the defendant to pay to the plaintiff £ [*two*] months after date; and the defendant accepted the said bill, but did not pay the same. Drawer against acceptor of bill.

18. That the defendant, on, &c. [*date*], by his bill of exchange, directed to *A.* required *A.* to pay to the plaintiff £ [*two*] months after date; and the said bill was duly presented for acceptance, and was dishonoured, of which the defendant had due notice, but did not pay the same. Payee against drawer.

19. That the plaintiff and defendant agreed to marry one another, and a reasonable time for such marriage has elapsed, and the plaintiff has always been ready and willing to marry the defendant, yet the defendant has neglected and refused to marry the plaintiff. Breach of promise of marriage.

20. That the plaintiff and defendant agreed to marry one another on a day now elapsed, and the plaintiff was ready and willing to marry the defendant on that day, yet the defendant neglected and refused to marry the plaintiff.

21. That the defendant, by warranting a horse to be then sound and quiet to ride, sold the said horse to the plaintiff, yet the said horse was not then sound and quiet to ride. Warranty of a horse.

22. That the plaintiff and the defendant agreed by charter-party, that the plaintiff's ship called the "Ariel" should with For not loading, pursuant to charterparty.

all convenient speed sail to *R.*, or so near thereto as she could safely get, and that the defendant should there load her with a full cargo of tallow or other lawful merchandize, which she should carry to *H.*, and there deliver, on payment of freight, £ per ton, and that the defendant should be allowed ten days for loading, and ten for discharge, and ten days for demurrage, if required, at £ per day; and that the plaintiff did all things necessary on his part to entitle him to have the agreed cargo loaded on board the said ship at *R.*, and that the time for so doing has elapsed, yet the defendant made default in loading the agreed cargo.

Upon a lease for rent.

23. That the plaintiff let to the defendant a house, No. 401, Piccadilly, for seven years, to hold from the day of , A.D. at £ a year, payable quarterly, of which rent quarters are due and unpaid.

Upon a covenant to repair.

24. That the plaintiff by deed let to the defendant a house No. 401, Piccadilly, to hold for seven years from the day of , A.D. , and the defendant by the said deed covenanted with the plaintiff well and substantially to repair the said house during the said term [*according to the covenant*], yet the said house was during the said term out of good and substantial repair.

For Wrongs independent of Contract.

Trespass to land.

25. That the defendant broke and entered certain land of the plaintiff, called the Big Field, and depastured the same with cattle.

Assault, battery, and false imprisonment.

26. That the defendant assaulted and beat the plaintiff, gave him into custody to a policeman, and caused him to be imprisoned in a police office.

Criminal conversation.†

27. *That the defendant debauched and carnally knew the plaintiff's wife.*

Wrongful conversion of goods.

28. That the defendant converted to his own use,* or wrongfully deprived the plaintiff of the use and possession of* the plaintiff's goods; that is to say, iron, hops, household furniture [*or as the case may be*].

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† It has since been enacted by Stat. 20 & 21 Vict. c. 85, s. 59, that "no action shall be maintained in England for criminal conversation."

* The words between these asterisks are said to have been suggested by the late Lord Denman in substitution for the word "converted," to the use of which in this "wrongful" sense, his lordship appears to have entertained some objection. The form, probably by some oversight at press, got printed as it now stands. While many pleaders employ it *literatim*; others, *ex abundanti cautelâ*, substitute the conjunctive "and" for the disjunctive "or;" and others, again, believing the allegations, though varying in words, to be of precisely similar legal efficacy, prefer in their practice the more ancient expression. See *Baker* v. *Gray* (17 C. B. 462); *London and Westminster Loan Company* v. *Drake* (L. J. 28, C. P. 297).

Wrongful detention of property, &c.

29. That the defendant detained from the plaintiff his title-deeds of land called Belmont, in the county of ; that is to say [*describe the deeds*].

Diverting water from a mill.

30. That the plaintiff was possessed of a mill, and by reason thereof was entitled to the flow of a stream for working the same, and the defendant, by cutting the bank of the said stream, diverted the water thereof away from the said mill.

Infringement of a patent.

31. That the plaintiff was the first and true inventor of a certain new manufacture, that is to say, of "certain improvements in the manufacture of sulphuric acid," and thereupon Her Majesty Queen Victoria, by letters-patent under the Great Seal of England, granted the plaintiff the sole privilege to make, use, exercise, and vend the said invention within England for the term of fourteen years from the day of A.D. , subject to a condition that the plaintiff should within six calendar months next after the date of the said letters-patent cause to be enrolled in the High Court of Chancery an instrument in writing under his hand and seal, particularly describing and ascertaining the nature of his said invention, and in what manner the same was to be and might be performed, and the plaintiff did within the time prescribed fulfil the said condition, and the defendant during the said term did infringe the said patent right.

Defamation of character.

32. That the defendant falsely and maliciously spoke and published of the plaintiff the words following; that is to say, "he is a thief;"

[*If there be any special damage, here state it with such reasonable particularity as to give notice to the defendant of the peculiar injury complained of; for instance,*]

whereby the plaintiff lost his situation as gamekeeper in the employ of *A*.

33. That the defendant falsely and maliciously printed and published of the plaintiff in a newspaper called " " the words following; that is to say, "he is a regular prover under bankruptcies," the defendant meaning thereby that the plaintiff had proved and was in the habit of proving fictitious debts against the estates of bankrupts, with the knowledge that such debts were fictitious.

COMMENCEMENT OF PLEA.

34. The defendant by his attorney [*or* in person] says [*here state the substance of the plea*].

35. And for a second plea the defendant says [*here state the second plea*].

Pleas in Actions on Contracts.

Denial of debt.

36. That he never was indebted as alleged.

[*This plea is applicable to declarations like those numbered* 1 *to* 14.]

Denial of contract.

37. That he did not promise as alleged.

[*This plea is applicable to other declarations on simple contracts, not on bills and notes, such as those numbered* 19 *to* 22. *It would be unobjectionable to use* "did not warrant," "did not agree," *or any other appropriate denial.*]

Denial of deed.

38. That the alleged deed is not his deed.

Statute of Limitations.

39. That the alleged cause of action did not accrue within six years [*state the period of limitation applicable to the case*] before this suit.

Payment.

40. That before action he satisfied and discharged the plaintiff's claim by payment.

Set-off.

41. That the plaintiff at the commencement of the suit was, and still is, indebted to the defendant in an amount equal to the plaintiff's claim, for [*here state the cause of set-off, as in a declaration:* see *forms, ante*], which amount the defendant is willing to set off against the plaintiff's claim.

Release.

42. That *after the alleged claim accrued, and before this suit*, the plaintiff by deed released the defendant therefrom.

Pleas in Actions for Wrongs independent of Contract.

Not guilty.

43. That he is not guilty.

Leave and licence.

44. That he did what is complained of by the plaintiff's leave.

Self-defence.

45. That the plaintiff first assaulted the defendant, who thereupon necessarily committed the alleged assault in his own defence.

Right of way.

46. That the defendant at the time of the alleged trespass, was possessed of land, the occupiers whereof for twenty years before this suit enjoyed as of right and without interruption a way on foot and with cattle from a public highway over the said land of the plaintiff to the said land of the defendant, and from the said land of the defendant over the said land of the plaintiff to the said public highway, at all times of the year, for the more convenient occupation of the

said land of the defendant, and that the alleged trespass was a use by the defendant of the said way.

47. That the defendant at the time of the alleged trespass, was possessed of land, the occupiers whereof for thirty years before this suit enjoyed as of right and without interruption, common of pasture over the said land of the plaintiff for all their cattle, levant and couchant, upon the said land of the defendant at all times of the year, as to the said land of the defendant appertaining, and that the alleged trespass was a use by the defendant of the said right of common. Right of common.

REPLICATIONS.

48. The plaintiff takes issue upon the defendant's 1st, 2nd, &c., pleas. Joinder of issue.

49. The plaintiff as to the second plea says [*here state the answer to the plea as in the following forms:*] Replication to pleas containing new matter.

50. That the alleged release is not the plaintiff's deed.

51. That the alleged release was procured by the fraud of the defendant. To plea of release.

52. That the alleged set-off did not accrue within six years before this suit. To plea of set-off.

53. That the plaintiff was possessed of land whereon the defendant was trespassing and doing damage, whereupon the plaintiff requested the defendant to leave the said land, which the defendant refused to do; and thereupon the plaintiff gently laid his hands on the defendant in order to remove him, doing no more than was necessary for that purpose, which is the alleged first assault by the plaintiff. To self-defence.

54. That the occupiers of the said land did not for twenty years before this suit enjoy as of right and without interruption the alleged way. To right of way.

NEW ASSIGNMENT.

55. The plaintiff as to the and pleas, says, that he sues not for the trespasses therein admitted, but for trespasses committed by the defendant in excess of the alleged rights, and also in other parts of the said land and on other occasions, and for other purposes than those referred to in the said pleas. To the pleas of right of way and right of common.

[*If the plaintiff replies and new assigns, the new assignment may be as follows:*]

56. And the plaintiff, as to the and pleas, further says that he sues not only for the trespasses in those pleas admitted, but also for, &c.

[*If the plaintiff replies and new assigns to some of the pleas, and new assigns only to the other, the form may be as follows:*]

57. And the plaintiff, as to the and pleas, further says, that he sues not for the trespasses in the pleas [*the pleas not replied to*] admitted, but for the trespasses in the pleas [*the pleas replied to*] admitted, and also for, &c.

THE

COMMON LAW PROCEDURE ACT, 1854.

(17 & 18 VICT. c. 125).

An Act for the further Amendment of the Process, Practice and Mode of Pleading in and enlarging the Jurisdiction of the Superior Courts of Common Law at Westminster, and of the Superior Courts of Common Law of the Counties Palatine of Lancaster and Durham.

[12th August, 1854.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows :—

TRIAL BY THE COURT OR A JUDGE.

Judge may, by consent, try questions of fact.

1. The parties to any cause may, by consent in writing, signed by them or their attornies, as the case may be, leave the decision of any issue of fact to the court, provided that the court, upon a rule to show cause, or a judge on summons, shall, in their or his discretion, think fit to allow such trial; or provided the judges of the superior courts of law at Westminster shall, in pursuance of the power hereinafter given to them, make any general rule or order dispensing with such allowance, either in all cases or in any particular class or classes of cases to be defined in such rule or order; and such issue of fact may thereupon be tried and determined, and damages assessed where necessary, in open court, either in term or vacation, by any judge who might otherwise have presided at the trial thereof by jury, either with or without the assistance of any other judge or judges of the same court, or included in the same commission at

the assizes; and the verdict of such judge or judges shall be of the same effect as the verdict of a jury, save that it shall not be questioned upon the ground of being against the weight of evidence; and the proceedings upon and after such trial, as to the power of the court or judge, the evidence, and otherwise, shall be the same as in the case of trial by jury.

The verdict in a cause tried by a judge cannot be questioned on the ground of its being against the weight of evidence. Such verdict is, on questions of fact, conclusive. If questions of law arise on the trial, as they frequently do, some difficulty may be found in keeping the judge's ruling on these altogether distinct from his verdict on matters of fact (see *Melling* v. *Leak*, 16 C. B. 652).

The consent of the parties should be in writing; but when they have taken part in the trial, the absence of writing cannot be relied upon to avoid the result (*Andrews* v. *Elliott*, 5 E. & B. 502; and *in error*, 6 E. & B. 338).

A commissioner of assize is a judge within the meaning of this section (*Andrews* v. *Elliott*, *ubi supra*).

See R. G., M. V. 1854, Schedule 1—8, *post*.

Trial of Causes in Westminster and London.

Two judges may sit at same time for trial of causes pending in the same court.

2. It shall be lawful for any one of the judges of any of the superior courts at Westminster, at the request of the Lord Chief Justice or Lord Chief Baron, to try the causes entered for trial at Nisi Prius in Westminster and London in either of the courts, on the same days on which the said Lord Chief Justice or Lord Chief Baron, or any other judge of the same court, shall be sitting to try causes at those places respectively, or at either of them, so that the trial of two causes may be proceeded with at the same time; and all jurors, witnesses and other persons who may have been summoned or required to attend at or for the trial of any cause before the said Lord Chief Justice or Lord Chief Baron, as the case may be, shall give their attendance at and for the trial thereof before such other judge as may be sitting to try the same by virtue of this act; and it shall be lawful for the associates and other officers of the Lord Chief Justice or Lord Chief Baron, as the case may be, to appoint from time to time fit and proper persons, to be approved by the said Lord Chief Justice or Lord Chief Baron, to attend for them and on their behalf respectively before such judge; and the trial of every cause which shall be so had by virtue of this act shall, if necessary, be entered of record, as having been had

before the judge by whom such cause in fact was tried.

See s. 95, *post*, as to the power of the courts to appoint sittings; and s. 59, *post*, as to the powers of the courts or a judge to make rules or orders for the attendance of a special or common jury.

COMPULSORY REFERENCE TO ARBITRATION.

Power to court or judge to direct arbitration before trial.

3. If it be made appear, at any time after the issuing of the writ, to the satisfaction of the court or a judge, upon the application of either party, that the matter in dispute consists wholly or in part of matters of mere account which cannot conveniently be tried in the ordinary way, it shall be lawful for such court or judge, upon such application, if they or he think fit, to decide such matter in a summary manner, or to order that such matter, either wholly or in part, be referred to an arbitrator appointed by the parties, or to an officer of the court, *or, in country causes, to the judge of any county court,** upon such terms as to costs and otherwise as such court or judge shall think reasonable; and the decision or order of such court or judge, or the award or certificate of such referee, shall be enforceable by the same process as the finding of a jury upon the matter referred.

Compulsory reference before trial.

One or other of the parties must, in strictness, *apply* for a reference under this section; but in practice some judges dispense with the concurrence of either party. It might perhaps have been argued that the power given by this section could only be exercised *before* trial, and could not strictly be exercised by a judge *at* the trial. But practice has determined otherwise; and cases are constantly referred by judges at the trial under this section (*Murray* v. *Sunderland Dock Company*, 1 F. & F. 179; *Jones* v. *Beaumont*, 1 F. & F. 336).

It has been said (*Robson* v. *Lees*, 6 H. & N. 258; L. J. 30, Ex. 235) that this section does not give power to a judge *at Nisi Prius* to refer: but, however that may be, a judge often brings about references at Nisi Prius, by intimating to the unwilling party that, upon an immediate adjournment of the court for the purpose, a summons under this section may be made returnable forthwith before him *quasi in camerâ*.

The cause, and not all matters in difference, can alone be referred under this section (*Kendil* v. *Merrett*, 18 C. B. 173; L. J. 25, C. P. 251). Where the matter in dispute consists *in part* of matters of mere account, the *whole* may be referred (*Browne* v. *Emerson*, 17 C. B. 361; *Reece* v. *Chaffers*, 11 W. R. 307; Q. B., H. T. 1863); even although a question of fraud is involved (*Imhof* v. *Sutton*, L. R. 2 C. P. 406); and if a question arises

* County Court judges are now relieved of these references by 21 & 22 Vict. c. 74, s. 5. As to the effect of such reference formerly see *Edwards* v. *Edwards* (5 C. B., N. S. 536; L. J. 28, C. B. 25).

upon the inquiry before the referee, he must still proceed with it (*Insull* v. *Moojen*, 3 C. B., N. S. 359; L. J. 27, C. P. 75).

An action for not repairing, was referred under this section; some claim having been admitted by payment of money into court (*Angell* v. *Fellgate*, 7 H. & N. 396; L. J. 31, Ex. 41); and such matters are now referred as of course.

In a reference of a building contract to a master, it was held by the Court of Common Pleas that he might, without the consent of the parties, send a surveyor to view the work in order to inform his mind of the work done, &c.; but not to the exclusion of the witnesses of the parties (*Gray* v. *Wilson*, L. R. 1 C. P. 51).

A compulsory reference was refused in an action on bills of exchange (*Pellatt* v. *Markwick*, 3 C. B., N. S. 760). See for instances of references ordered, *Cummings* v. *Birkett* (3 H. & N. 156); *Murray* v. *Sunderland Dock Company* (1 F. & F. 179); *Jones* v. *Beaumont* (1 F. & F. 336); *Goodred* v. *Seale* (2 F. & F. 382); where an action on an attorney's bill, to which a set-off was *inter alia* pleaded, was referred by Blackburn, J.; and *Baggalay* v. *Borthwick* (10 C. B., N. S. 61; *S. C. sub nom. Baguley* v. *Markwick*, L. J. 30, C. P. 342).

A cause though referred remains under the control of the court (*Edwards* v. *Edwards*, 5 C. B., N. S. 536); and therefore amendments may be made (*Gibbs* v. *Knightley*, 2 H. & N. 34; *Thompsett* v. *Bowyer*, 9 C. B., N. S. 284; L. J. 30, C. P. 1); but the court cannot (*qu.* will not) set aside an award, or remit a case back to the arbitrator (under sect. 8, *post*, p. 209), in any case where it could not, or would not, do so upon a reference by consent (*Hogge* v. *Burgess*, 3 H. & N. 293; *Hodgkinson* v. *Fernie*, 3 C. B., N. S. 189; *Baggalay* v. *Borthwick*, *ubi supra*); but see on this subject, *British Empire Company* v. *Somes* (3 K. & J. 433; L. J. 26, Ch. 759).

Costs. As to *costs*, see *Leggo* v. *Young* (16 C. B. 626); *Bell* v. *Postlethwaite* (5 E. & B. 695); and *Edwards* v. *Edwards* (*ubi supra*).

County Courts Acts. With regard to the effect of the County Courts Acts as respects costs, where by the order of reference they are to abide the event, the rule now established after some conflicting decisions is, that "whenever the plaintiff is entitled to judgment in the action and gets his damages in the action, and the case is such that if there had been no reference the plaintiff would by virtue of the County Courts Acts have lost his costs in the cause, so he does equally lose them when there is a reference which fixes the amount, unless he has succeeded in getting the necessary certificate" (*Smith* v. *Edge*, 2 H. & C. 659; L. J. 33, Ex. 9, *per* Bramwell, B.; approved and adopted by Court of Queen's Bench in *Cowell* v. *Amman* (*Aberdare*) *Colliery Company*, 6 B. & S. 333; L. J. 34, Q. B. 161, after conference with the other courts). This rule applies equally where a verdict is entered at the trial by consent subject to a reference (*Smith* v. *Edge*, *ubi supra*); where the cause is referred by consent before trial (*Cowell* v. *Amman Colliery Company*, *ubi supra*); and where the order is a compulsory order of reference under this section (*Robertson* v. *Sterne*, 13 C. B., N. S. 248; L. J. 31, C. P. 362). It applies also to the costs of a compulsory reference where by the terms of the order they are left to the discretion of the master and he awards them to the plaintiff (*Moore* v. *Watson*, L. R. 2 C. P. 314). The effect of the County Courts Acts on costs is very much simplified by the County Courts

Act, 1867 (30 & 31 Vict. c. 142), which came into operation on the 1st of January, 1868 ; *vide* C. L. P. Act, 1860, s. 34, n. *post*.

As to *enforcing award*, see ss. 7, 10, 16 (*post*, pp. 208-9, 214); and R. G., M. V. 1854, sched. 9, 10, *post*; *Kendil* v. *Merrett* (18 C. B. 173); and *Talbot* v. *Fisher* (2 C. B., N. S. 471). *Enforcing awards.*

The Court of Chancery will still restrain actions at law, when the accounts are complicated, and can be more readily taken in Chancery (*Croskey* v. *The European and American Steam Shipping Company*, 1 Johns. & H. 108).

As to the specific performance of an award, see *Blackett* v. *Bates* (L. J. 34, Ch. 575, reversed by Chelmsford, C., L. R., 1 Ch. 117).

4. If it shall appear to the court or a judge that the allowance or disallowance of any particular item or items in such account depends upon a question of law fit to be decided by the court, or upon a question of fact fit to be decided by a jury, or by a judge upon the consent of both parties as hereinbefore provided, it shall be lawful for such court or judge to direct a case to be stated, or an issue or issues to be tried; and the decision of the court upon such case, and the finding of the jury or judge upon such issue or issues, shall be taken and acted upon by the arbitrator as conclusive. **Special cases may be stated, and question of fact tried.**

See s. 5, and note, *infra*; and for forms see R. G., M. V. 1854, Sched. 11—13, *post*.

5. It shall be lawful for the arbitrator upon any compulsory reference under this act, or upon any reference by consent of parties where the submission is or may be made a rule or order of any of the superior courts of law or equity at *Westminster*, if he shall think fit,* and if it is not provided to the contrary, to state his award, as to the whole or any part thereof, in the form of a special case, for the opinion of the court, and when an action is referred, judgment, if so ordered, may be entered according to the opinion of the court. **Arbitrator may state special case.**

This section applies practically to all references, see s. 17 (*post*, p. 215).

As to bringing up prisoners under a *habeas* to give evidence before the arbitrator see *Graham* v. *Glover* (5 E. & B. 591; L. J. 25, Q. B. 10); and *Marsden* v. *Overbury* (18 C. B. 34; L. J. 25, C. P. 200).

The provisions of s. 32, *post*, as to bringing error upon a special

* See observations in *Baggalay* v. *Borthwick* (10 C. B., N. S. 61); and see *Holloway* v. *Francis* (9 C. B., N. S. 599).

case, do not apply to a special case stated by an arbitrator under this section (*Gumm* v. *Fowler*, 2 E. & E. 890; L. J. 29, Q. B. 189).

See forms, R. G., M. V. 1854, Sched. 14, 15, *post*.

Power to judge to direct arbitration at time of trial,

6. If upon the trial of any issue of fact by a judge under this act it shall appear to the judge that the questions arising thereon involve matter of account which cannot conveniently be tried before him, it shall be lawful for him, at his discretion, to order that such matter of account be referred to an arbitrator appointed by the parties, or to an officer of the court, *or, in country causes, to a judge of any county court,** upon such terms as to costs and otherwise as such judge shall think reasonable; and the award or certificate of such referee shall have the same effect as hereinbefore provided as to the award or certificate of a referee before trial; and it shall be competent for the judge to proceed to try and dispose of any other matters in question not referred in like manner as if no reference has been made.

when issues of fact left to his decision.

This section is confined to the trial of issues of fact by a judge under s. 1 (*ante*, p. 203); and no application by either party is necessary to give this further jurisdiction to refer. See s. 3 and note (*ante*, pp. 205-7).

See form, R. G., M. V. 1854, Sched. 16, *post*.

Proceedings before and power of such arbitrator.

7. The proceedings upon any such arbitration as aforesaid shall, except otherwise directed hereby, or by the submission or document authorizing the reference, be conducted in like manner, and subject to the same rules and enactments, as to the power of the arbitrator and of the court, the attendance of witnesses, the production of documents, enforcing or setting aside the award and otherwise, as upon a reference made by consent under a rule of court or judge's order.

As to *enforcing the award*, see s. 3, and note (*ante*, pp. 205, 207); and *O'Toole* v. *Pott* (7 E. & B. 102; cited *ante*, p. 107).

See also generally Chit. Arch., 12th edit., vol. ii., part vii.

Power to send back to arbitrator.

8. In any case where reference shall be made to arbitration as aforesaid, the court or a judge shall have power at any time and from time to time to remit the matters referred, or any or either of them, to the reconsideration and re-determination of the said arbi-

* See p. 203, note, *ante*.

trator, upon such terms as to costs and otherwise as to the said court or judge may seem proper.

This section is co-extensive with s. 5 (*ante*, p. 207, *Re Morris*, 6 E. & B. 383).

The court will only remit under this section, where it would have done so formerly upon a voluntary reference (*Hodgkinson* v. *Fernie*, 3 C. B., N. S. 189, and other cases cited in note to sect. 3, *ante*, p. 206).

See generally *Holland* v. *Judd* (3 C. B., N. S. 826), and Russell on Arbitration, 3rd edit. p. 444, *et seq.*

Formerly, an application to refer back to the arbitrator must have been made within the same time as an application to set aside the award (*Doe* d. *Banks* v. *Holmes*, 12 Q. B. 951). Though it is said, that it may now be made *at any time*; yet if this section be read with s. 9, *infra*, an application to remit should be made within the first seven days of the term next following the publication of the award.

The remitting of the matters referred is to be on such terms as to costs and otherwise, as may seem proper. Where an award is referred back to the arbitrator for amendment, and the costs of the reference are in his discretion, the two awards constitute one award, and the arbitrator has the same power as to the costs of the amended award, as he had in the disposal of the costs generally (*Macrae* v. *Maclean*, 2 E. & B. 946).

A Court of Equity will act under this section (*Re Warner and Powell's Arbitration*, L. R. 3 Eq. 261).

Application to set aside the award.

9. All applications to set aside any award made on a compulsory reference under this act shall and may be made within the first seven days of the term next following the publication of the award to the parties, whether made in vacation or term; and if no such application is made, or if no rule is granted thereon, or if any rule granted thereon is afterwards discharged, such award shall be final between the parties.

This and the following sections are confined to awards made on a reference under ss. 3, 6 (*ante*, pp. 205, 208). As to the grounds on which an award will be set aside, and the time and mode of doing so, see Russell on Arbitration, 3rd edit., pp. 642, *et seq.* Where a rule to show cause is obtained to set aside an award, the several objections thereto, which are intended to be insisted upon at the time of moving to make such rule absolute, must be stated in the rule to show cause (R. G., H. T. 1853, r. 169; and R. G., M. V. 1854, r. 1, *post*).

It is not necessary that the judge's order referring a cause under sect. 3 (*ante*, p. 205), should be made a rule of court before applying under this section to set aside the award (*Bennett* v. *Watson*, 5 H. & N. 831; L. J. 29, Ex. 357). If the application be made on the seventh day it is in time although the rule be not drawn up till some days later. (*Id.*)

An application to the court, even though made by consent, to set aside any award must be made in the term following the publication of the award (*Re N. British Railway Company* v. *Trowsdale*, L. R. 1 C. P. 401); and in cases falling within Stat. 9 & 10

Will. 3, c. 15, the application must, under sect. 2, be made before the last day of that term; as to the construction of this section see Chit. Stat. 3rd edit. vol. i. p. 89, n. (*c*); and Russell on Arbitration, 3rd edit. pp. 643, *et seq.*

Enforcing of awards within period for setting them aside.

10. Any award made on a compulsory reference under this act may, by authority of a judge, on such terms as to him may seem reasonable, be enforced at any time after seven days from the time of publication, notwithstanding that the time for moving to set it aside has not elapsed.

This section is only applicable where the reference was compulsory.

The costs may be taxed, notwithstanding the time for setting aside the award has not elapsed (R. G., H. T. 1853, r. 170; and R. G., M. V. 1854, r. 1, *post*).

Amendments in the Law of Arbitration.

If action commenced by one party after all have agreed to arbitration, court or judge may stay proceedings.

11. Whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree that any then existing or future differences between them or any of them shall be referred to arbitration, and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them, shall nevertheless commence any action at law or suit in equity against the other party or parties, or any of them, or against any person or persons claiming through or under him or them in respect of the matters so agreed to be referred, or any of them, it shall be lawful for the court in which action or suit is brought, or a judge thereof, on application by the defendant or defendants, or any of them, after appearance and before plea or answer, upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration according to such agreement as aforesaid, and that the defendant was at the time of the bringing of such action or suit, and still is, ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit, on such terms as to costs and otherwise, as to such court or judge may seem fit: Provided always, that any such rule or order may at any time afterwards be discharged or varied as justice may require.

Formerly an agreement to refer matters in dispute to arbitra-

tion, did not oust the courts of their jurisdiction; and a plea to an action, that such an agreement had been entered into, and that the arbitrator had entered on, and was proceeding with the reference, was bad; it constituted no defence (*Harris* v. *Reynolds*, 7 Q. B. 71; see also *Scott* v. *Avery*, 5 H. L. C. 811; L. J. 25, Ex. 308; *Horton* v. *Sayer*, 4 H. & N. 643; L. J. 29, Ex. 28; and *Elliott* v. *Royal Exchange Assurance Company*, L. R. 2 Ex. 237). The addition of a covenant not to sue, would seem to vitiate an agreement to refer future disputes to arbitration (*Lee* v. *Page*, L. J. 30, Ch. 857). If a reference under a rule of court were pending, and it had been agreed that it should operate as a stay of proceedings, it might have been made the subject of an application to the court to stay proceedings (*Dicas* v. *Jay*, 6 Bing. 519; *Louis* v. *Kermode*, 8 Taunt. 146).

This section does not alter the law as to the effect of such a plea as that in *Harris* v. *Reynolds*, *ubi supra* (*Cooke* v. *Cooke*, L. R. 4 Eq. 77), but it enables the defendant to apply to the court to stay the proceedings in the action.

An application may be made under this section to stay the proceedings in an action, before the agreement to refer has been made a rule of court, which every agreement in writing to refer may now be, unless express provision be made to the contrary (s. 17, *post*, p. 215). The rule or order should, in the first instance, be applied for at chambers.

It seems that the agreement to refer, if made between parties to a written instrument relating to the matters to be referred, need not itself be in writing (*Mason* v. *Haddan*, 6 C. B., N. S. 526; better than *Blyth* v. *Lafone*, 1 E. & E. 435; L. J. 28, Q. B. 164).

The terms "any then existing or future differences" include all differences arising out of the contract, and within its scope (*Russell* v. *Pellegrini*, 6 E. & B. 1020; L. J. 26, Q. B. 75; *Wickham* v. *Harding*, L. J. 28, Ex. 215; *Seligmann* v. *Le Boutillier*, L. R. 1 C. P. 681); but see *Daunt* v. *Lazard* (L. J. 27, Ex. 399). Differences of law as well as of fact fall within this section (*Randegger* v. *Holmes*, L. R. 1 C. P. 679).

Semble, the words "persons claiming through or under him or them" do not include assignees in bankruptcy (*Pennell* v. *Walker*, 18 C. B. 651).

The grounds on which leave to revoke an agreement to refer has hitherto been granted, are stated in Russell on Arbitration, 3rd ed. p. 147, *et seq.*; see also *Wallis* v. *Hirsch* (1 C. B., N. S. 316; and *Hirsch* v. *Im Thurn* (4 C. B., N. S. 569), decided upon this section.

No order will be made under this section, where the object of the defendant is merely to delay the plaintiff (*Lucy* v. *Pearson*, 1 C. B., N. S. 639).

On failure of parties or arbitrators, judge may appoint single arbitrator or umpire.

12. If in any case of arbitration the document authorizing the reference provide that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator; or if any appointed arbitrator refuse to act, or become incapable of acting, or die, and the terms of such document do not show that it was

intended that such vacancy should not be supplied, and the parties do not concur in appointing a new one; or if, where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator, such parties or arbitrators do not appoint an umpire or third arbitrator; or if any appointed umpire or third arbitrator refuse to act, or become incapable of acting or die, and the terms of the document authorizing the reference do not show that it was intended that such a vacancy should not be supplied, and the parties or arbitrators respectively do not appoint a new one; then in every such instance any party may serve the remaining parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire or third arbitrator respectively; and if within seven clear days after such notice shall have been served no arbitrator, umpire or third arbitrator be appointed, it shall be lawful for any judge of any of the superior courts of law or equity at *Westminster*, upon summons to be taken out by the party having served such notice as aforesaid, to appoint an arbitrator, umpire or third arbitrator, as the case may be, and such arbitrator, umpire and third arbitrator respectively shall have the like power to act in the reference, and make an award, as if he had been appointed by consent of all parties.

Quære whether there must be some suit or arbitration actually pending (*Re Cox* v. *Hopwood*, 6 W. R. 664, Ex. T. T. 1858). Romilly, M. R., has held that a contract of sale, leaving the price to be determined by valuers, and matters in difference between them to be determined by umpire, is not within this section (*Collins* v. *Collins*, 26 Beav. 306; L. J. 28, Ch. 184; *Bos* v. *Helsham*, L. R. 2 Ex. 72). As to the distinction between a mere valuation and an arbitration, see *Re Hopper* (L. R. 2 Q. B. 367) and cases there cited.

This section applies to references under the arbitration clauses of the Companies Clauses Act, 1845, 8 Vict. c. 16, ss. 128—134 (*Lord's case*, 1 K. & J. 90; L. J. 24, Ch. 145); of the Companies Act, 1862, 25 & 26 Vict. c. 89, s. 162 (*Re Anglo-Italian Bank* and *De Rosaz*, L. R. 2 Q. B. 452).

When reference is to two arbitrators and one party fails to appoint, other party may appoint arbitrator to act alone.

13. When the reference is or is intended to be to two arbitrators, one appointed by each party, it shall be lawful for either party, in the case of the death, refusal to act, or incapacity of any arbitrator appointed by him, to substitute a new arbitrator, unless the document authorizing the reference show that it was intended that the vacancy should not be supplied; and if on such a reference one party fail to appoint an arbitrator, either originally or by way of substitution

as aforesaid, for seven clear days after the other party shall have appointed an arbitrator, and shall have served the party so failing to appoint with notice in writing to make the appointment, the party who has appointed an arbitrator may appoint such arbitrator to act as sole arbitrator in the reference, and an award made by him shall be binding on both parties as if the appointment had been by consent; provided, however, that the court or judge may revoke such appointment on such terms as shall seem just.

Two arbitrators may appoint umpire.

14. When the reference is to two arbitrators, and the terms of the document authorizing it do not show that it was intended that there should not be an umpire, or provide otherwise for the appointment of an umpire, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award, unless they be called upon by notice as aforesaid to make the appointment sooner.

The arbitrators must meet and agree on an umpire, but they need not be together when they afterwards sign his formal appointment (*Re Hopper*, L. R. 2 Q. B. 367). If the two arbitrators each nominate a candidate for the umpirate, and they agree that either of the two candidates is a proper person for the office, it is no objection that the arbitrators afterwards select the umpire by lot from the two persons so nominated (*Neale* v. *Ledger*, 16 East, 51; *Re Hopper*, *ubi supra*). If, however, the arbitrators do not use their judgment at all, but merely appoint the umpire by lot, the appointment is bad (*Re Cassell*, 9 B. & C. 624; *European and American Steam Shipping Company* v. *Croskey*, 8 C. B., N. S. 397; L. J. 29, C. P. 155).

Award to be made in three months, unless parties or court enlarge time.

15. The arbitrator acting under any such document or compulsory order of reference as aforesaid, or under any order referring the award back, shall make his award under his hand, and (unless such document or order respectively shall contain a different limit of time) within three months after he shall have been appointed, and shall have entered on the reference, or shall have been called upon to act by a notice in writing from any party, but the parties may, by consent in writing, enlarge the term for making the award; and it shall be lawful for the superior court of which such submission, document, or order is or may be made a rule or order, or for any judge thereof, for good cause to be stated in the rule or order for enlargement, from time to time to enlarge the term for making the awards; and if no period be stated for the enlargement in such consent or order for enlargement, it shall be deemed to be an enlargement for one

month; and in any case where an umpire shall have been appointed, it shall be lawful for him to enter on the reference in lieu of the arbitrators, if the latter shall have allowed their time or their extended time to expire without making an award, or shall have delivered to any party or to the umpire a notice in writing stating that they cannot agree.

This section means that the award must be made within three months from the time the arbitrator holds his first sitting, either with both parties before him or under a peremptory appointment enabling him to proceed *ex parte*, so as to be in a position to enter into the matter, and not from the time that the arbitrator accepted the office, or took upon himself the functions of an arbitrator by merely giving notice of his intention to proceed (*Baker* v. *Stephens*, L. R. 2 Q. B. 523). The same construction applies where the matter is referred back by the court and the arbitrator has to enter into the reference *de novo*. (*Id.*)

Before the passing of this section the only power the court or a judge had to enlarge the time for making the award beyond the time provided by the order of reference, was that given by Stat. 3 & 4 Will. 4, c. 42, s. 39, which provided "that the power and authority of any arbitrator or umpire appointed by or in pursuance of any rule of court, or judge's order, or order of Nisi Prius, in any action now brought or which shall be hereafter brought, or by or in pursuance of any submission to reference containing an agreement, that such submission shall be made a rule of any of his Majesty's Courts of Record, shall not be revocable by any party to such reference without the leave of the court by which such rule or order shall be made, or which shall be mentioned in such submission or by leave of a judge, and the arbitrator or umpire shall and may and is hereby required to proceed with the reference, notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference, and that the court or any judge thereof may, from time to time, enlarge the term for any such arbitrator making his award." This power was thus only given in arbitrations falling within the terms of the section; for cases thereon, see Chit. Stat. 3rd ed., vol. iii., p. 90. The present section applies to all cases of arbitration where the submission is in writing.

3 & 4 Will. 4, c. 42, s. 39.

The fact of the consent not being in "writing," is merely an irregularity, and as such may be waived; it is sufficient if the parties continue without objection to attend before the arbitrator (*Tyerman* v. *Smith*, 6 E. & B. 719; L. J. 25, Ex. 359; and see *Bennett* v. *Watson*, 5 H. & N. 831; L. J. 27, Ex. 357).

As to the waiver of a condition that an award shall be made within a specified time, by one of the parties taking up the award although he knew it was made after the expiration of the time, see *Earl of Darnley* v. *L. C. and Dover Railway Company* (L. R. 2 H. L. 43).

The omission in the rule or order of a statement of "good cause" is also a mere irregularity (*Re Burdon*, L. J. 27, C. P. 250).

The power of enlargement may be exercised after the expiration of the three months (*Watson* v. *Beavan*, 8 W. R. 612, Ex. T. T. 1860); as, *semble*, from above cases, that 3 & 4 Will. 4,

c. 42, s. 39 (*supra*), is not repealed; see also *Ward* and *The Secretary of War* (L. J. 32, Q. B. 53).

The power of the court to enlarge the time for making the award under this section, as under 3 & 4 Will. 4, c. 42, s. 39 (*supra*), is discretionary, and will not be exercised unless both parties will afterwards be on an equal footing (*Edwards* v. *Davies*, L. J. 23, Q. B. 278, Bail Court, where many cases on this subject are collected); nor will it be exercised where there has been a long delay since the last step was taken, and such delay is not satisfactorily accounted for (*Doe* d. *Mayo* v. *Carmell*, L. J. 22, Q. B. 321).

This section does not apply to a compulsory reference to arbitration under The Public Health Act, 1848, 11 & 12 Vict. c. 63, (*Kellett* v. *Local Board of Health of Tranmere*, L. J. 34, Q. B. 87).

Rule to deliver possession of land pursuant to award to be enforced as a judgment in ejectment.

16. When any award made on any such submission, document or order of reference as aforesaid directs that possession of any lands or tenements capable of being the subject of an action of ejectment shall be delivered to any party, either forthwith or at any future time, or that any such party is entitled to the possession of any such lands or tenements, it shall be lawful for the court of which the document authorizing the reference is or is made a rule or order, to order any party to the reference who shall be in possession of any such lands or tenements, or any person in possession of the same claiming under or put in possession by him since the making of the document authorizing the reference, to deliver possession of the same to the party entitled thereto, pursuant to the award, and such rule or order to deliver possession shall have the effect of a judgment in ejectment against every such party or person named in it, and execution may issue, and possession shall be delivered by the sheriff as on a judgment in ejectment.

As the title to land could not pass by an award, it frequently became necessary that the award should direct a conveyance to be made (see *Johnson* v. *Wilson*, Willes, 248), and that direction could formerly only be enforced by a bill in equity.

See form of writ of execution, R. G., M. V. 1854, sched. 17, post.

Agreement or submission in writing may be made rule of court, unless a contrary intention appear.

17. Every agreement or submission to arbitration by consent, whether by deed or instrument in writing, not under seal, may be made a rule of any one of the Superior Courts of Law or Equity at *Westminster*, on the application of any party thereto, unless such agreement or submission contain words purporting that the parties intend that it should not be made a rule of court; and if in any such agreement or submission it

is provided that the same shall or may be made a rule of one in particular of such superior courts, it may be made a rule of that court only; and if when there is no such provision a case be stated in the award for the opinion of one of the superior courts, and such court be specified in the award, and the document authorizing the reference have not, before the publication of the award to the parties, been made a rule of court, such document may be made a rule only of the court specified in the award; and when in any case the document authorizing the reference is or has been made a rule or order of any one of such superior courts, no other of such courts shall have any jurisdiction to entertain any motion respecting the arbitration or award.

As to what is an arbitration within this section, *vide* s. 12, note (*ante*, p. 212), and cases there cited.

Under 9 & 10 Will. 3, c. 15, s. 1, which first enabled either of the parties to have an agreement to refer made a rule of court, it was necessary for them "to insert such their agreement in their submission."

Where there is a reference, by judge's order, to arbitration, and the costs of the action and of the reference are left in the discretion of the arbitrator, the costs of making the award a rule of court are in the discretion of the court, and will not be allowed unless deemed necessary; nor will they be deemed so, if the award has been made a rule of court without a previous demand of the money (*Carter* v. *The Burial Board of Tonge*, 5 H. & N. 523; L. J. 29, Ex. 293).

In order that this section may apply, the submission to arbitration must be "by deed or instrument in writing." Where two persons agreed by deed to refer all matters in dispute which should arise between them in relation to a certain contract to two arbitrators, one to be chosen by each party, and on disputes arising arbitrators were appointed by parol; the Court of Exchequer held that the submission was by parol and could not be made a rule of court under this section (*Re Glaysher*, 3 H. & C. 442; L. J. 34, Ex. 41): but in a similar case where one of the parties to the deed had appointed an arbitrator *in writing*, and on the other party making default in appointing a second arbitrator, the arbitrator so appointed proceeded with the inquiry and made his award, the Court of Common Pleas allowed the submission to be made a rule of court under this section (*Re Newton* and *Hetherington*, 19 C. B., N. S. 342, followed in *Re Willcox* v. *Storkey*, L. R. 1 C. P. 671).

Where one person executes a submission to arbitration for himself and another not his partner, his authority to make such submission must be proved before the submission can be made a rule of court (*Re Aldington and another* v. *Cheshire*, 15 C. B., N. S. 375).

A submission to arbitration is in general revocable by either party at any time before the publication of the award, the only cases in which it is not revocable are those falling within the provisions of Stat. 3 & 4 Will. 4, c. 42, s. 39, (cited s. 15, n., *ante*, p. 214); for the cases decided thereon, see Chit. Stat. 3rd

ed., vol. iii., p. 90. The operation of that section is not extended by the present one to all submissions made in writing (*Mills* v. *Bayley*, 2 H. & C. 36; L. J. 32, Ex 179).

It may be here remarked that an action may be maintained on a judge's order of reference made by consent, this being evidence of an agreement between the parties to perform the award (*Lieversley* v. *Gilmore*, L. R. 1 C. P. 570); *vide* R. G., H. T. 1853, r. 25, n., *post*.

See generally Chit. Arch., 12th ed. pp. 1631—1709.

PROCEEDINGS AT THE TRIAL.

Speeches to the jury.

18. Upon the trial of any cause the addresses to the jury shall be regulated as follows: the party who begins, or his counsel, shall be allowed, in the event of his opponent not announcing at the close of the case of the party who begins his intention to adduce evidence, to address the jury a second time at the close of such case, for the purpose of summing up the evidence;* and the party on the other side, or his counsel, shall be allowed to open the case, and also to sum up the evidence (if any); and the right to reply shall be the same as at present.

The order of beginning has been decided to be a matter for the disposal of the judge at *Nisi Prius*; and an incorrect ruling as to the proper party to begin is no ground for a new trial, unless the ruling "did clear and manifest wrong" (*Brandford* v. *Freeman*, 5 Exch. 734; see also *Ashby* v. *Bates*, 15 M. & W. 589; and *Doe* v. *Brayne*, 5 C. B. 655).

The right to begin ordinarily accompanies the *onus probandi*; the best test seems to be by ascertaining which side would be entitled to a verdict, if no evidence were given. *Ei incumbit probatio qui dicit, non qui negat*: (*Amos* v. *Hughes*, 1 M. & Rob. 464; *Seward* v. *Leggatt*, 7 C. & P. 613; *Geach* v. *Ingall*, 14 M. & W. 95; *Leete* v. *Gresham Insurance Company*, 15 Jur. 1161, Ex., M. T. 1851); and in all cases where the plaintiff may recover damages of unascertained amount, he is, notwithstanding the proof of the issues may rest upon the defendant, but in strict accordance with this principle, entitled to begin (*Mercer* v. *Whall*, 5 Q. B. 447); thus, in an action for negligence where the only plea was one of accord and satisfaction, the plaintiff was held, by Martin, B., to be entitled to begin (*Pim* v. *The Eastern Counties Railway Company*, 2 F. & F. 133).

Where the judge decides that there is no evidence to go to the jury on the plaintiff's case, his counsel is not entitled to sum up (*Hodges* v. *Ancrum*, 11 Exch. 214).

A counsel who has not announced his intention to adduce evidence, in consequence of which the party who began sums

* The summing up is not generally very strictly limited to the evidence adduced on behalf of the party whose counsel is thus privileged to sum up. It generally assumes the dimensions of a general reply. But see hereon *Glennie* v. *Glennie & Bowles* (3 Sw. & Tr. 109; L. J. 32, P. & M. 17).

up his case, cannot be permitted afterwards to alter his mind and adduce evidence (*Darby* v. *Ousley*, 1 H. & N. 1).

It may be mentioned here, that upon the argument of cross demurrers, the plaintiff is in the Queen's Bench and Common Pleas entitled to begin (*Halhead* v. *Young*, 6 E. & B. 312; L. J. 25, Q. B. 290; *Wolverhampton New Water-Works Company* v. *Hawkesford*, L. J. 28, C. P. 242; *Churchward* v. *The Queen*, L. R. 1 Q. B. 173), but in the Exchequer the party first demurring is so entitled (*Hill* v. *Cowdery*, 1 H. & N. 360; L. J. 25, Ex. 285; *Redway* v. *Sweeting*, L. R. 2 Ex. 400).

Power to adjourn trial.

19. It shall be lawful for the court or judge, at the trial of any cause, where they or he may deem it right for the purposes of justice, to order an adjournment for such time, and subject to such terms and conditions as to costs, and otherwise, as they or he may think fit.

A new trial may be granted when one party is taken wholly by surprise by his adversary's case (*Roberts* v. *Holmes*, 2 C. L. R. 726, C. P., E. T. 1854).* So a deficiency in proof may occur; and if it occur from other causes than the negligence of the party on whose part the failure arises, in getting up his proof, an adjournment may be allowed. A postponement was formerly granted (*Thompson* v. *Lewis*, 2 C. L. R. 707, C. P., H. T. 1854) when a necessary witness was absent; if it was applied for on proper affidavits, *before* the trial began. Such "a deficiency in proof," it would seem, is now a good ground for an application for an adjournment.

Where a party hesitated at the trial to consent to a reference of all matters in difference, Willes, J., intimated that unless the necessary consent was given, he would adjourn the trial of the cause until the next assizes (*Jones* v. *Beaumont*, 1 F. & F. 336).

The circumstances in, and the terms upon which, an adjournment may be granted, are in the discretion of the judge.

This enactment applies to every court of civil judicature in England and Ireland (s. 103, *post*).

Alterations in the Law of Evidence.

General Observations.

Many important alterations having been made by recent legislation in the rules relating to the examination of witnesses, and additional facilities having been afforded for the admission and proof of documentary evidence, it seems desirable briefly to notice the general state of the law relating to evidence, before treating in detail those enactments of this statute which introduce still further alterations.†

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* The cases illustrating the principles on which the courts act with respect to new trials in special circumstances, more or less partaking of the nature of surprise, are collected in a note to *Lewis* v. *Trussler* (2 C. L. R. 728, C. P., E. T. 1854).

† The following resumé of the laws of evidence is mainly taken from the *Second Report of the Common Law Commissioners*, 1850 (published in 1853), to which document the reader is referred for further details.

For the purposes of these observations, evidence will be considered, first, as *oral;* secondly, as *documentary*.

Oral Evidence.

The rules of law relating to oral evidence may be considered, firstly, in reference to the admissibility of witnesses; secondly, to the manner of their examination.

Admissibility of witnesses.

It is obvious that any witness who can throw light upon a fact in issue should be heard to state what he knows, subject to such observations as may arise either as to his means of knowledge, or to his disposition to state the truth. And this has always been the law of England; subject, however, to an important exception, by which all those persons were excluded as witnesses who were either *infamous*, or *interested* in the event of the cause. All others were *competent* witnesses; the jury were to judge of their *credibility*.

Infamous persons were such as might be challenged as jurors, *propter delictum*, and were not admitted to inform that jury, with whom they might not associate.

Interested witnesses might be examined upon the *voir dire*, if suspected to be secretly concerned in the event; or their interest might be proved, in order to disqualify them. The law thus carefully excluded not only the parties to the cause, but any one who had the most minute interest in the result; for every person so circumstanced, however insignificant his interest, was presumed incapable of resisting the temptation to perjury; as every judge and juryman was presumed incapable of discerning perjury committed under circumstances (according to the former presumption) especially calculated to excite suspicion. The first inroad on this exclusion of evidence was made by the Stat. 3 & 4 Will. 4, c. 42, s. 26, which enacted that "in order to render the rejection of witnesses on the ground of interest less frequent, if any witness should be objected to as incompetent, on the ground that the verdict or judgment in the action would be admissible in evidence for or against him, he should nevertheless be examined; but in that case the verdict or judgment should not be admissible for or against him, or any one claiming under him."

3 & 4 Will. 4, c. 42, s. 26.

A greater improvement was effected by the Stat. 6 & 7 Vict. c. 85, which (s. 1) removed incompetency, on the ground of interest, in all persons, except the parties to any suit, action, or proceeding named on the record, or any lessor of the plaintiff in ejectment, or tenant of the premises sought to be recovered in that action, or the landlord or other person in whose right any defendant in replevin made cognizance, or any person in whose immediate and individual behalf any action was brought or defended, or the husband or wife of such persons. The advantages found to flow from this alteration in the law led to the Statute 14 & 15 Vict. c. 99; by the first section of which so much of the 6 & 7 Vict. c. 85, s. 1, as excepted the admissibility as witnesses, of parties to, and of persons directly interested in actions was repealed. The second section enacts, that in any court of justice, the parties and the persons in whose behalf any action, suit, or other proceeding may be brought or defended, shall, except as therein excepted, be competent and compellable to give evidence on behalf of either or any of the parties to the

6 & 7 Vict. c. 85, s. 1.

14 & 15 Vict. c. 99.

Sect. 1.

Sect. 2.

Admissibility of witnesses.

Sect 3.

Sect. 4.

16 & 17 Vict. c. 83.

Sects. 1, 4.

Sect. 3.

Sect. 2.

22 & 23 Vict. c. 61, s. 6.

suit. The third section of the statute provides, that it shall not render any person charged with an offence competent or compellable to give evidence against himself, nor shall it render any person compellable to answer any question tending to criminate himself, nor shall it in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband. The fourth section of the statute further provides that it shall not apply to any proceeding instituted in consequence of adultery,* nor to any action for breach of promise of marriage. It was decided, soon after it had become law, that the *second* section of this statute did not render a wife admissible as a witness for or against her husband; and accordingly the Statute 16 & 17 Vict. c. 83 (the Evidence Amendment Act, 1853), was passed, which enacts (ss. 1, 4), that the husbands and wives of the parties to any suit, or of the persons on whose behalf any such proceeding was brought or defended, should thereafter be competent and compellable to give evidence on behalf of either party, or of any of the parties. Neither husband or wife is compellable, however, to disclose any communication during marriage (s. 3); and neither party is a competent witness in a criminal proceeding, nor in any proceeding instituted in consequence of adultery (s. 2). As it was held that in a suit instituted by the wife for the dissolution of her marriage by reason of her husband's adultery coupled with wilful desertion, she was not, by reason of the exceptions in the above acts, a competent witness to prove the desertion (*Pyne* v. *Pyne*, 1 Sw. & Tr. 178; L. J. 27, P. M. & A. 54), it was enacted by the Stat. 22 & 23 Vict. c. 61, s. 6. that "on any petition presented by a wife praying that her marriage may be dissolved by reason of her husband having been guilty of adultery coupled with cruelty, or of adultery coupled with desertion, the husband and the wife respectively shall be competent and compellable to give evidence† of or relating to such cruelty or desertion." It would appear that this section does not apply to the case of a wife, who, as respondent, seeks relief under Stat. 29 Vict c. 32, s. 2. By these several statutes all rules tending to the exclusion of evidence have been abrogated, except in the cases specified.

Manner of examination.

The second branch of the law relating to oral evidence regulates the examination of witnesses; and its fundamental principle is, that the value of all testimony rests on the sanction of religion.‡

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* See *Robinson* v. *Robinson and Lane* (1 Sw. & Tr. 382; L. J. 27, P., M. & A. 91).

† As to cross-examination on the issue of adultery, in the case of a husband or wife giving evidence under this act, see *Boardman* v. *Boardman* (L. R. 1 P. & D. 233).

‡ A witness, a party to the cause, when about to be sworn, was objected to on the ground of want of religious belief. The judge caused her to be sworn on the *voir dire*, and she was examined by the opposing counsel, and stated that she did not believe in the obligation of an oath, any more than in that of her word, nor did she believe in a future state of rewards and punishments; but that she was morally bound, by the solemn declaration she had taken, to speak the truth. The judge thereupon refused to admit her to be examined in the cause —Held, that the witness was properly rejected; that there was nothing irregular in the course pursued; and that the witness being sworn on the *voir dire* did not prevent her subsequent rejection (*Madan and Wife* v. *Catanach*, 7 H. & N. 360; L. J. 31, Ex. 118).

Hence, no evidence can be received otherwise than upon oath; except in the case of certain religious sects, who are allowed to make a solemn affirmation. But the religious sanction is, as to them, considered equally indispensable; so that the witness is always liable to be asked whether he believes in a future state of reward and punishment, and in the event of his answering in the negative, he is excluded from giving evidence.

Affirmation instead of oath.

The exception just mentioned has hitherto been in favour of Quakers, Moravians and Separatists; but it has often happened that an individual, not belonging to either of these denominations, has, from conscientious motives, refused to be sworn. The consequence has been, not only the loss of his evidence to the party calling the witness, but the exposure of the latter to a committal for contempt. Individuals have been committed for refusing to be sworn though the only result was that in such cases the witness suffered for conscience sake; while justice may have been defeated by the want of his testimony. There could be no reason why the same regard, which is had to the scruples of bodies of persons calling themselves Quakers, Moravians or Separatists, should not be extended to those of an individual; and it was thought that it might be left to a judge to ascertain whether an objection professed by a witness in such circumstances was sincere or not. Accordingly, if any person called as a witness now refuses to be sworn from alleged conscientious motives, the judge may, upon being satisfied of the sincerity of the objection, permit the witness, instead of being sworn, to make a solemn affirmation or declaration; which, it is enacted, shall be of the same force and effect as if the witness had taken an oath in the usual form (s. 20, *post*, p. 229).

How far a party may discredit his own witness.

It occasionally happens that a witness, called under a belief that he will prove a certain fact, turns round upon the party calling him, and proves directly the reverse. The party calling the witness was not precluded from proving by other testimony what the witness had negatived; but whether he ought to be allowed to discredit his own witness, either by impeaching his character, or by showing that he had previously made statements at variance with the evidence given by him, was a point upon which the decisions of the courts were conflicting.

"For the admissibility of the proposed evidence, it is said that this course is necessary as a security against the contrivance of an artful witness, who otherwise might recommend himself to a party by the promise of favourable evidence (being really in the interest of the opposite party), and afterwards by hostile evidence ruin his cause; and that the power of proving contradictory statements ought to be the same, whether the witness is called by the one party or the other: that such a power is necessary for the purpose of placing the witness fairly and completely before the court, and for enabling the jury to ascertain how far he deserves to be believed: that the ends of justice are best attained by allowing the fullest power for scrutinizing and correcting evidence, and that the exclusion of the proof of contrary statements might be attended with the worst consequences.

"The chief objection to the proposed evidence appears to be, that a party, after calling a witness as a witness of credit, ought not to be allowed to discredit him. The objection proceeds upon the supposition that the party first acts on one principle, and afterwards, being disappointed by the witness, turns round and acts upon another, thus imputing to the party something of double

How far a party may discredit his own witness.

dealing or dishonest practice. But it is evident that this does not apply to the case where a party, having given credit to a witness, is deceived by him, and first discovers the deceit at the trial of the cause. To reject the proposed evidence in such a case, and repress the truth, would be to allow the witness to deceive both jury and party, and might work serious injustice."—(*Second Report of the Common Law Commissioners*, 1850, p. 16.)

The argument in favour of the admissibility of such evidence was powerfully put by Lord Denman in his judgment in the case of *Wright* v. *Beckett* (1 M. & Rob. 414).—"If the witness professing to be mine," says his lordship, "has been bribed by my adversary to deceive me,—if, having taught me to expect the truth from him, he is induced by malice or corruption to turn round upon me with a newly-invented falsehood, which defeats my just right, and throws discredit on all my other witnesses,—must I be prevented from showing the jury facts like these? Suppose that in some dispute happening in the street, a bystander declares his name to one of the contending parties, and his readiness to prove his conduct blameless; that he attends the solicitor, and gives in his deposition to the same effect, but, when sworn in open court, takes part with the adversary. The question then is, whether *he* is to be believed, or the *other* witnesses called by the same party. Some one in court happens to know him, and whispers to the attorney, 'He has deceived you in every way; he has given you a false name; he is the adversary's brother and partner: moreover, he has been for years notoriously infamous!' Or, suppose such a trial for misdemeanour, as some that have lately revolted the public mind; and that some stranger, after voluntarily offering his testimony to a calumniated man, should unexpectedly side with his false accuser. If the rule against discrediting your own witness must be strictly construed, these deceptions cannot be exposed. You will be told that you have called him; you must take him for better and for worse, and must be bound by all his statements. Or, if you are permitted, by reason of your late discovery of these facts, to prove them for your own necessary protection, this must be, because the rule cannot apply to a case where such facts are brought to your knowledge after you have placed him in the witness-box. The rule, therefore, is limited by that condition; and you shall be at liberty to discredit your witness by such evidence, because you have been deceived and surprised. Can any reason then be assigned, why, when equally deceived by his denying to-day what he asserted yesterday, you should be excluded from showing the contradiction into which, from whatever motive, he has fallen? It is clear that, in civil cases, the exclusion might produce great injustice, and in criminal cases improper acquittals and fraudulent convictions."

The Commissioners were of opinion, with Lord Denman, that a party should be permitted not only to contradict the testimony of his own witness by other evidence, but also to prove that the witness himself had made opposite statements. The Legislature has acted on this opinion. While, then, a party producing a witness is not to be allowed to impeach his credit by general evidence of bad character, he may, if the witness in the opinion of the judge proves adverse, contradict him by other evidence; or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony. But before such last-mentioned proof can be given, the circumstances of the statement, sufficient to designate the particular

occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement (s. 22, *post*, p. 230).

Proof of contradictory statements of adverse witnesses.

In cross-examination, it is frequently material, with a view of impeaching the credit of an adverse witness, to show that he has previously made statements different from those to which he has deposed in court. If these statements were verbal, and were relevant to the matter at issue, and the witness, having been cross-examined on them, so as to give him an opportunity of explanation, denied having made them, evidence might be adduced to prove the statements as to which he had been cross-examined.

The rule of law was thus stated by Parke, B., in *Crowley* v. *Page* (7 C. & P. 791): "Evidence of statements by witnesses on other occasions relevant to the matter at issue, and inconsistent with the testimony given by them on the trial, is always admissible in order to impeach the value of that testimony; but it is only such statements as are relevant that are admissible; and, in order to lay a foundation for the admission of such contradictory statements, and to enable the witness to explain them, and, as I conceive, for that purpose only, the witness may be asked whether he ever said what is suggested to him, with the name of the person to whom or in whose presence he is supposed to have said it, or some other circumstance sufficient to designate the particular occasion. If the witness, on the cross-examination, admits the conversation imputed to him, there is no necessity for giving further evidence of it; but if he says *he does not recollect*, that is not an admission, and you may give evidence on the other side to prove that the witness did say what is imputed, always supposing the statement to be relevant to the matter at issue. This has always been my practice. If the rule were not so, you could never contradict a witness who said he could not remember."

A doubt had arisen on the law as laid down above by Mr. Baron Parke, in consequence of Lord Chief Justice Tindal having, in one case, said he had never heard such evidence admitted in contradiction, except where the witness had *expressly denied* the statement; and of Lord Abinger having, on another occasion, expressed a similar opinion. This conflict of authority has been set at rest, and Mr. Baron Parke's ruling, as "the most sound and fittest to be followed," has been expressly enacted.

If a witness, upon cross-examination as to a former statement by him, inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it. But before such proof can be given, the circumstances of the statement, sufficient to designate the particular occasion, must be mentioned to him, and he must be asked whether or not he has made such statement (s. 23, *post*, p. 231).

When the contradictory statement alleged to have been made by the witness was *in writing*, the rule, as laid down in the *Queen's Case* (2 B. & B. 286), had hitherto been, that the cross-examining counsel must produce the document as *his* evidence, and have it read, in order to found upon it any questions to the witness. That this rule might not be evaded, it was further laid down that the witness could not be asked whether he had ever made *representations* of the nature suggested to him, without counsel informing him whether the question referred to representations in writing, or in words alone. Thus a counsel defending a

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prisoner was not permitted to ask a witness for the prosecution whether he had not made a different statement before the magistrate, without first reading over and putting in his deposition. The effect of the rule in practice was to exclude the former statement; and its soundness was much questioned by judges, and by commentators on the Law of Evidence. Lord Brougham has observed, "If I wish to put a person's memory to the test, I am not allowed to examine him as to the contents of a letter or other paper which he has written. I must put the document into his hands before I ask him any questions upon it; though, by so doing, he at once becomes acquainted with its contents, and so defeats the object of my inquiry. Neither am I, in like manner, allowed to apply the test to his veracity; and yet, how can a better means be found of sifting a person's credit, supposing his memory to be good, than examining him to the contents of a letter written by him, and which he believes to be lost?"

The chief reason assigned for the rule was, that the adoption of a contrary course would enable the cross examining counsel to put the court in possession of a part only of the contents of the writing, though a knowledge of the whole might be essential. But the obvious answer to this objection to an alteration in the rule is, that the witness, on re-examination, may be questioned as to any other parts of the writing which may tend to qualify, contradict or explain the passages referred to in cross-examination. The rule has accordingly been altered; and a witness may now be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the cause, without such writing being shown to him. But if it is intended to contradict the witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of contradicting him (s. 24, *post*, p. 232).

The judge may also, at any time during the trial, require the production of the writing for his inspection, and make such use of it for the purposes of the trial as he thinks fit (s. 24, *post*, p. 232). Any abuse of the facility for cross-examination thus given, may be prevented by the judge calling for and dealing with the writing as he thinks fit.

Proof of previous conviction of a witness.

An important test of the veracity of a witness may be found in his general character. If he has been guilty of offences which imply want of probity, and especially absence of veracity, such as perjury, forgery, or the like, such facts ought evidently to be considered in forming an estimate of the value of his evidence, particularly if it be in conflict with the testimony of another witness of unquestioned integrity. But because a person is in possession of a fact which is important to another in a legal proceeding, to which he individually is no party, should he, by becoming a witness to prove that fact, be made liable to be interrogated as to some delinquency of which no proof may exist, or as to some offence for which he has already paid the penalty? The obvious hardship of subjecting a witness to such an examination becomes more striking if the individual, having been really guilty of any offence, has since recovered his character and the good opinion of his neighbours. But if the witness deny the imputation? Should the party cross-examining be at liberty to prove, by other testimony, the offence or the conviction which he alleges against the witness? Such a course might involve grievous injustice to the witness, for he might have no notice of

the accusation about to be made, and could not be expected to come prepared to defend himself from charges of which he might be wholly innocent.

The law of England accordingly protected a witness against such consequences; and, while it allowed such questions to be put, it left the witness at liberty not to answer; and if he did answer, and denied the imputation, his denial was conclusive, and could not be controverted. The rule has, however, been modified. A witness may be questioned, as he has hitherto been, as to whether he has been convicted of any felony or misdemeanor; but if, upon being so questioned, he either denies the fact, or refuses to answer, the opposite party may prove such conviction (s. 25. *post.* p. 233). The denial of the witness, or his refusal to answer, is no longer conclusive. On the contrary, it exposes his whole evidence to the imputation of being false, if a conviction be proved. On the other hand, if the fact of the conviction be admitted by the witness, the examination can go no further; and the admission will afford ground for a presumption, that in other matters the witness has spoken the truth, since he has not hesitated to confess a crime of his previous life.

With regard to questions which do not tend to expose him to prosecution, but which tend to degrade his character by imputing to him misconduct not amounting to legal criminality or the having been convicted of a crime, the law in like manner protects him in refusing to answer, unless the misconduct imputed has reference to the cause itself.

The law of England also protects a witness in refusing to answer any question where the answer may tend to subject him to a criminal prosecution, a penalty, or a forfeiture.

Documentary Evidence.

The law as to *documentary* evidence has also been in some respects altered and improved. Many instruments must be attested by one or more witnesses. Thus a will, to be valid, must be attested by two witnesses; an agreement between a master of a ship and a merchant seaman by one; a warrant of attorney or cognovit must be attested by an attorney. Instruments are often attested in a particular way, in consequence of their being executed under powers, where the parties creating such powers have required such attestation. It is also usual in the case of instruments under seal, and by no means uncommon in the case of ordinary written agreements, to have documents subscribed by one or more attesting witnesses. *Attesting witnesses.*

It had formerly been the rule, that before an attested document could be received in evidence, the attesting witness should be called to prove the execution. So stringent was this rule, that in a recent action of ejectment by a mortgagee, in which the execution of the mortgage was admitted by the defendant in the witness-box, the plaintiff was notwithstanding nonsuited by the judge, and by the court held to have been so properly. "The principle on which the necessity for producing the attesting witness rests, is, that the witness is supposed to be conversant with all the circumstances under which the deed was executed. But it is notorious that, in practice, the attesting witness, in the majority of instances, knows nothing of the transactions; the instrument having been prepared, a clerk, a servant or a neighbour is called in to attest it. Added to which, as parol testimony is

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not admitted to contradict or vary the terms of a written instrument, the occasions are few indeed where the evidence of the attesting witness goes further than to prove the execution of the writing. On the other hand, the necessity of calling the witness, where the execution of the instrument is not the real matter in dispute, and where there are no concomitant circumstances to be inquired into, is often attended with difficulty and expense, and sometimes [*as in the case above referred to*] leads to the defeat of justice. Cases have occurred where, in tracing a title, numerous witnesses from distant parts have been rendered necessary to prove the formal execution of deeds, though their execution was not really in dispute, and the handwriting to all might have been proved by a single witness, and doubtless would have been admitted, but for the difficulty which it was thought would, by the existing rule, be thrown in the way of the party alleging title."—(*Second Report of the Common Law Commissioners*, 1850, p. 23.) It has sometimes also happened at a trial, that it has become necessary to give in evidence a document which it had not been supposed would be required; or a document has been produced by a witness, which unexpectedly turned out to be attested. The attesting witness not being at hand, although the signature of the party might be easily proved, or the witness producing the instrument might have heard him admit the execution, the document could not be received, and the party requiring it has accordingly lost his cause.

When the genuineness of a document is not in dispute, the parties ought not to be limited to any particular witness to prove the execution. When the genuineness is in dispute, the party producing it will be sure to call the attesting witness, as his absence would tend to throw the greatest discredit on the instrument. It is, therefore, no longer necessary to prove by the attesting witness any instrument *to the validity of which attestation is not requisite;* and such instruments may be proved by admission, or otherwise, as if there had been no attesting witness thereto (s. 26, *post*, p. 234).

Comparison of handwriting.

In giving documentary evidence, the genuineness of handwriting frequently comes in dispute. Hitherto handwriting might have been proved by a witness who had acquired a knowledge of it, by having seen the party write even in a single instance; or by one who had never seen the party write at all, but who, by correspondence which had been acted upon, had acquired a knowledge of his writing. The law, however, did not allow a witness to institute a comparison between the handwriting in dispute and documents the genuineness of which was not disputed, and it prevented even the jury from doing so, unless such documents were otherwise in evidence in the cause.

This rule of law, and a doubt which has arisen as to the extent to which it ought to be carried, are well illustrated in two cases referred to by the Commissioners (1850) in their Report.

In *Doe* d. *Mudd* v. *Suckermore* (5 A. & E. 703), which was an action of ejectment, a will was produced for the defendant; and on one day of the trial an attesting witness was called, who swore that the attestation was his. On cross-examination, eighteen other signatures were shown the witness (none of which were in evidence), and he acknowledged them to be his. On a subsequent day, a witness was tendered for the plaintiff to prove the attestation not to be genuine. This witness was an inspector at the Bank of England. It was his business to compare the signatures to powers of attorney with the former signatures of the

parties, to ascertain their genuineness; but he had no knowledge of the handwriting of the supposed attesting witness, except from having previously to the trial, and again since he had been called as a witness, examined the signatures admitted by him to be his. His evidence was rejected; and on motion for a new trial, on the ground of the improper rejection of evidence, the question was, whether the witness, who had, by seeing the signatures of the writings admitted to be genuine, acquired, as he affirmed, a knowledge of the handwriting, might be asked whether he believed the signature of the attesting witness to be the handwriting of the person who wrote the other signatures. Two judges were of opinion that the evidence ought to have been received; the others that it ought not. It would seem that the evidence was properly rejected. In the *Fitzwalter Peerage Case* (10 Cl. & Fin. 193), it was necessary to show that a pedigree, purporting to have been made ninety years before, by an ancestor of the claimant, was, in point of fact, written by him. In order to do so, an inspector of franks and official correspondence was called, who stated that he had examined the signatures to other documents admitted to have been executed by the ancestor; that they were written in a remarkable character, and that his mind was so impressed with that character, as to enable him, without immediate comparison, to say whether any other document was or was not in the handwriting of the same person. This evidence was rejected by the Committee. The family solicitor was then called. He stated that he had acquired a knowledge of the ancestor's handwriting from having had occasion, at different times and in the course of business, to examine many instruments purporting to have been written or signed by him, and which instruments came to the claimant of the peerage, with property formerly belonging to that ancestor. This witness was held competent to prove the ancestor's handwriting.

Comparison of handwriting.

There was also a difference of opinion on another point, viz., whether writings not admissible as evidence in the cause, though purporting to be written by the party whose handwriting is disputed, may be put into the witness's hand, to be used for testing his knowledge of that handwriting. In *Griffits* v. *Ivery* (11 A. & E. 322), the issue being whether the acceptance on a bill of exchange was signed by the defendant, witnesses acquainted with his writing being called to prove the negative, it was proposed, in cross-examination, to lay before each witness a paper purporting to bear the defendant's signature, and to inquire of each his opinion whether this was the defendant's signature. This was proposed for the purpose of testing their knowledge of the defendant's handwriting. This evidence was rejected; and the Court of Queen's Bench decided that, as the proposed paper was no part of the proofs in the cause, the inquiry was not allowable. In the subsequent case of *Young* v. *Honner* (2 M. & R. 536), an action against the defendant as acceptor of a bill, a witness called on his behalf stated that he believed the signature not to be the handwriting of the defendant—giving, as his reason, that the defendant always signed his name with certain initials, the signature to the bill being at full length. In cross-examination a paper, not in any way relevant to the issue, being put into his hand, he stated that he believed it to bear the genuine signature of the defendant. It was then proposed to ask him whether the signature was not in the same form as that upon the bill, namely, at full length. Upon this being objected to, Baron Alderson,

Comparison of handwriting.

after consulting the Court of Exchequer, stated that they were unanimously of opinion that the cross-examination was regular, and that the question objected to might be put. The Court of Exchequer could not concur in the decision of the Court of Queen's Bench in *Griffits* v. *Ivery* (*ubi supra*).

The reasons for the exclusion of other writings as a medium of comparison, are fully discussed in the Report of the Commissioners, who were of opinion, moreover, that it was "indefensible in principle to allow a witness to institute a comparison with the recollection of writings which he may have seen long ago, and of which but a faint trace may remain on his mind, and yet to prohibit a fresh comparison with genuine writings, more especially when, for the purpose of trying the accuracy of the witness, it is proposed to apply the test of requiring his judgment on writing which is not disputed Still less defensible did it appear to leave the jury to act on the judgment of a witness who, after all, can only form that judgment on a comparison of the disputed writing with others, and yet to deny the jury the opportunity of forming their own judgment on the same materials."—(*Second Report of the Common Law Commissioners*, 1850. p. 26.)

The Commissioners accordingly suggested an alteration in the rule of law, and their recommendation has been adopted. Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, may now be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute (s. 27, *post*, p. 235).

Stamps.

The exclusion of documents as evidence, occasioned by the operation of the stamp laws, forms the subject of some comment in the Report above quoted. From confidence in each other, from a belief that a document will never be required in court, or from ignorance that it requires a stamp, parties often omit to have instruments properly stamped. Occasionally too, from inadvertence or accident, the stamp affixed is of insufficient amount. The document is inadmissible in evidence, though the party objecting is equally to blame for the omission; and the defeat of justice is often the result. The want of the stamp may (with certain exceptions) be cured by payment of a penalty, and in such cases, when it is anticipated that the instrument will be produced, the mischief may be avoided. But a document is often produced at a trial by a third party, and then for the first time it is discovered that a stamp is wanting, or that a stamp of a different amount and denomination ought to have been affixed. It was, before the passing of this act, too late, after the trial itself had begun, to stamp the instrument, and great injustice was frequently done in consequence. "As far as the administration of justice is concerned, it would be highly desirable that a stamp should not be the condition of the admissibility of an instrument; but so long as the stamp duties form a portion of the public revenue, it would, no doubt, be in vain to propose that the absence of the stamp should not be a ground of objection. All that can be done is to endeavour to reconcile the claims of justice with the interest of the revenue." —(*Second Report of the Common Law Commissioners*, 1850, p. 26.)

Stamp duty may be paid at the trial.

Accordingly, upon the production of any document as evidence at a trial, it is now the duty of the officer of the court, whose business it is to read such document, to call the attention

of the judge to any omission or insufficiency of the stamp; and the document, if unstamped, or not sufficiently stamped, is not to be received in evidence until the whole or (as the case may be) the deficiency of the stamp duty, and the penalty required by statute, together with the additional penalty of £1, has been paid (s. 28, *post*, p. 236).

The officer of the court must give a receipt for the amount of the duty or deficiency which the judge determines to be payable, and also of the penalty; and thereupon the document becomes admissible in evidence, saving all just exceptions on other grounds (s. 29, *post*, p. 237).

There is a class of documents which cannot be stamped after execution, even on payment of a penalty. It is thought that these instruments, if they could be stamped when the necessity arose, would not in general be stamped at all. These are not within the number of documents made admissible by the above enactment, which, it is expressly provided, is not to extend to any document which cannot now be stamped after the execution thereof (s. 29, *post*, p. 237).

Such are the alterations effected by the following sections in the law of evidence. They apply to every court of civil judicature in England (s. 103, *post*), are great improvements in the law, and have been found, in practice, very materially to further the ends of justice.* And by stat. 28 Vict. c. 18 (*Denman's Act*), provisions precisely similar to sections 22 to 27, *post*, are applied to all criminal trials.

Affirmation instead of oath in certain cases.

20. If any person called as a witness, or required or desiring to make an affidavit or deposition, shall refuse or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the court or judge, or other presiding officer, or person qualified to take affidavits or depositions, upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration in the words following: *videlicet*,

> "I, *A. B.*, do solemnly, sincerely and truly affirm and declare, that the taking of any oath is, according to my religious belief, unlawful; and I do also solemnly, sincerely and truly affirm and declare, &c."

which solemn affirmation and declaration shall be of

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* As to procuring the attendance of witnesses who are out of the jurisdiction, see 17 & 18 Vict c. 34 (Appendix, *post*).

the same force and effect as if such person had taken an oath in the usual form.

The enactments of this and the twelve following sections apply to every court of civil judicature in England and Ireland (s. 103, *post*).

Persons making a false affirmation subject to the same punishment as for perjury.

21. If any person making such solemn affirmation or declaration shall wilfully, falsely and corruptly affirm or declare any matter or thing, which, if the same had been sworn in the usual form, would have amounted to wilful and corrupt perjury, every such person so offending shall incur the same penalties as by the laws and statutes of this kingdom are or may be enacted or provided against persons convicted of wilful and corrupt perjury.

How far a party may discredit his own witness.

22. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

See *Ryberg* v. *Ryberg* (L. J. 32, P. M. & A. 112), *sed quære*.

These provisions are intended to meet the case of a witness unexpectedly turning round on the party calling him; and of enabling a party, who, from the nature of the inquiry, is obliged to call a witness, who then unexpectedly proves hostile, to contradict that witness, if needful; yet not so as to pick and choose his testimony, discarding part, and relying upon other part (per Campbell, C. J., *Faulkner* v. *Brine*, 1 F. & F. 254); or to enable a witness to be put forward, who is, avowedly, generally unworthy of credit.

It must not be inferred, from the use of the words "*general* evidence," that a party may give *particular* evidence of bad character; for such particular evidence as to the character of a witness (that is to say, particular instances of bad conduct) is not allowed to be given by either party, unless relevant to the issue; although now, a conviction for felony or misdemeanour may be given in evidence by the opposite party to that on whose behalf the witness is called, if the witness denies or refuses to admit such conviction (s. 25, *post*, p. 233).

To enable a party thus to contradict his own witness, the witness must appear not merely *unfavourable*, but actually *hostile* (*Greenhough* v. *Eccles*, 5 C. B., N. S. 786, Cockburn, C. J., *dubitante*; *Coles* v. *Coles*, L. R. 1 P. & D. 70, per Wilde, J. O.); and it would seem, from the first of those cases, doubtful whether

the decision of the judge at *Nisi Prius* is subject to review *in banco*.

This section does not introduce any new rule of evidence. In three classes of cases a party was always permitted to contradict the statement of a witness called by him. Firstly. Where he is under the necessity of calling a witness for the purpose of satisfying the formal proof which the law requires, he is not precluded from calling other witnesses who give contradictory testimony (*Starkie on Evidence*, 4th edit., p. 224); as where an attesting witness denied the fact of his attestation, or the signature of the party. Secondly. Where a witness, called to prove a particular fact, does not deny that fact, but gives evidence (generally on cross-examination) of other facts material to the same or other issues in the cause, as in the case put by Tindal, C. J., in delivering judgment in *Bradley* v. *Ricardo* (8 Bing. 58); or where a plaintiff, for some formal proof, is obliged to make a witness of the defendant's attorney, who, on cross examination, makes a statement adverse to the plaintiff; or where, on the question of a devise of real estate, an attesting witness is called to prove and does prove the execution of the will, but entertains an adverse opinion as to the capacity of the testator, as in *Lowe* v. *Joliffe* (1 Wm. Bl. 365). In either of these classes of cases it was always immaterial, so far as the right of the party to call contradictory evidence was concerned, whether he knew beforehand that the witness would prove adverse. Thirdly. Where a witness by surprise gives evidence against the party who called him, that party is not precluded from proving his case by other witnesses; for it would be contrary to justice, that the treachery of a witness should exclude a party from establishing the truth by aid of other testimony. (*Starkie, ubi supra.*)

Such contradictions must, on the general rules of evidence, be of facts material to the issue to be tried, for as the witness cannot be examined except as to facts material to the issue, by necessity he cannot be contradicted except on such material facts.

But independently of, or in addition to the contradiction as to facts, by other evidence, the party may, "*by leave of the judge, prove that the witness has made at other times a statement inconsistent with his present testimony.*" This also settles what was before a moot point, rather than introduces any positive new rule of evidence.

The "statement" may be verbal or written; it must be material to the issue, or (to use the words of the subsequent sections) it must be "relative to the subject-matter of the cause."

A series of letters may be used for the purpose, though one only be directly inconsistent (*Jackson* v. *Thomason*, 1 B. & S. 745; L. J. 31, Q. B. 11).

It is to be observed, that this section does not interfere with the right of a party to put a document into a witness's hands for the purpose of refreshing his memory; and this right, although ostensibly permitted for that purpose, is sometimes used not so much with a view to *assist* the memory, as to operate as a check on the mind of an adverse witness, from saying anything inconsistent with the truth, or at least with that previous statement.

23. If a witness, upon cross-examination as to a Proof of contradictory

statements of adverse witness.

former statement made by him relative to the subject-matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

It was never doubted that statements by witnesses on other occasions, relevant to the matter at issue, and expressly *denied* by them on the trial, were admissible in order to impeach the value of that testimony. As the proof allowed to be given by this section is of some *affirmative* statement, a question may arise, as to whether this section applies to the cross-examination of a witness, for the purpose of showing that he has made a statement, relative to the subject-matter of the cause, in which statement the particular fact or circumstance sworn to at the trial was not mentioned. It may be argued, that the refusal to admit the withholding of a fact in a former statement, is in fact a refusal to admit the making of that precise statement; and consequently that proof may be given, under this section, that he did in fact make such partial, and therefore inconsistent statement.

Cross examination as to previous statements in writing.

24. A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the cause, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he shall think fit.

This section alters the rule laid down in the *Queen's case* (2 B. & B. 286, *ante*. p. 223), as to the cross-examination of witnesses in respect of previous statements in writing.

The effect is this: the witness, in the first instance, may be asked, whether he has made such and such a statement in writing, without its being shown to him (*Sladden* v. *Serjeant*, 1 F. & F. 322, Willes, J.). If he denies that he has made it, the opposite party cannot put in the statement, without first calling his attention to it (showing it, or at least reading it to him), and to any parts of it relied upon as a contradiction. If the witness instead of denying that he has made the statement, admits it, although the object of the cross-examining counsel has been attained, it may be very important for the party calling the witness to have the whole statement, which may not be in his pos-

session, before the court and jury. If he is aware of the contents, he will, it would seem, in such case, be at liberty to re-examine the witness, as to the residue of the statement, without its being produced, on the general rule that if part of any connected conversation or statement be given, the whole may be used; or he may ask the judge, under the latter part of the section, to require the production of the writing.

It must be always borne in mind that this section is confined to written statements *made by the witness*, relative to the subject-matter of the cause. This section, therefore, does not interfere with the decision in *Macdonnell* v. *Evans* (11 C. B. 930). In that case, upon the cross-examination of a witness, a letter in his own handwriting was shown to him, and he was asked—"Did you not write that letter in answer to a letter charging you with forgery?" It was held that the question was inadmissible for *any* purpose, inasmuch as it was an attempt to get at the contents of a written document, which, for anything that appeared, might have been produced. As the question, therefore, referred to the contents of a letter written by a third person, and not by the witness, the case is not affected by this section. It is right to notice this, as the Commissioners, in their Second Report, apparently refer to the case of *Macdonnell* v. *Evans* (*ubi supra*) as one of the judicial decisions proceeding on the rule, which is now superseded.

But, in *Newman* v. *Lester* (12 C. B., N. S. 776; L. J. 31, C. P. 366), where a party to the cause gave evidence himself in support of his case, it was held, by Willes, J., and Keating, J. (Byles, J., dissenting), that he might be asked, on cross-examination, with a view of testing his credit, whether an action had not been brought against him by another person in the county court, in respect of a similar claim, upon which he had given evidence, and had had notwithstanding a verdict of the jury against him; and that he might be so examined without production and proof of the record of the proceedings in such county court.

Held, also, by Willes, J., and Keating, J., that, even if the judge at the trial ruled wrongly in allowing such questions to be put and answered, the court would not on that account grant a new trial, unless it could see that injustice had been occasioned by such mistaken ruling.

Proof of previous conviction of a witness may be given.

25. A witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanour, and, upon being so questioned, if he either denies the fact or refuses to answer, it shall be lawful for the opposite party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was convicted, or by the deputy of such clerk or officer (for which certificate a fee of five shillings and no more shall be demanded or taken), shall, upon proof of the identity of the person, be sufficient evidence of the

said conviction, without proof of the signature or official character of the person appearing to have signed the same.

The mode of proving the conviction is the same as that provided by the 7 & 8 Geo. 4, c. 28, s. 11, in the case of persons charged with committing a felony, after a previous conviction for felony. It has been held, under that statute, that the certificate must state, that judgment was given for the felony mentioned in it; so that it is not sufficient for it to state a conviction (*Reg.* v. *Ackroyd*, 1 C. & K. 158). With respect to the identity, it is sufficient to prove that the witness is the person who underwent the sentence mentioned in the certificate; and it is not absolutely necessary to call a witness, who was present at the trial to which the certificate refers (*Reg.* v. *Crofts*, 9 C. & P. 219). As to the signature to the certificate see *Reg.* v. *Parsons* (L. R. 1 C. C. 24).

This section does not interfere with the previous right, to cross-examine a witness as to the commission of offences, either for the purpose of discrediting him, or of contradicting him, if the question is so connected with the point in issue that the witness may be contradicted by the evidence if he deny the facts. Four rules on this subject may be considered as established in practice.

1. A witness may be *asked* any question, whether with a view to his discredit, or to contradict him (where contradictory evidence is admissible), although the answer may also tend to subject him to a criminal prosecution, a penalty or a forfeiture.

2. If the answer has such tendency, the witness is not bound to give it, whatever the object or effect of the question may be; and it was at one time thought that he was to judge for himself whether the effect of the answer would be such as to subject him to a criminal charge (*Fisher* v. *Ronalds*, 12 C. B. 762; but see now *Osborne* v. *London Dock Company*, 10 Exch. 698; L. J. 24, Ex. 140; *Reg.* v. *Boyes*, 1 B. & S. 311; L. J. 30, Q. B. 301; *Ex parte Fernandez*, 10 C. B., N. S. 3; L. J. 30, C. P. 321; see also notes to sect. 51, *post*): and when the witness assigns insufficient reason for not answering, he may certainly be compelled to answer (*Re Aston's Case*, 4 De G. & J. 320; 27 Beav. 474). See also *Best on Evidence*, Book II. Part I. Chap. I.

3. Evidence cannot be adduced to contradict the witness, if he deny the imputation, unless the fact sought to be established is material to the issue.

4. Before such evidence is given, the witness should be further questioned upon the subject, in order to afford him an opportunity for explanation.

Attesting witness need not be called, except in certain cases.

26. It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite; and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto.

Calling the attesting witness is only dispensed with in those cases, in which attestation is not requisite to the validity of the instrument. Where attestation is necessary to the validity of an instrument; the witness must be called, or his absence accounted for, and his signature proved (*Bowman* v. *Hodgson*, L. R. 1 P. & M. 362); unless the instrument proves itself by age and proper

custody: as to which, see Roscoe's Nisi Prius, 11th ed., p. 78, *et seq.*, and *Mytton* v. *Thornbury* (L. J. 29, M. C. 109, Ex).

As to who is an attesting witness, see the observations of Erle, C. J., in *Deffell* v. *White* (L. R. 2 C. P. 144).

The instruments to the validity of which attestation is requisite, may be divided into two classes; first, instruments which the parties themselves, or those under whom they claim or act, have stipulated shall require one or more attesting witnesses; * and, secondly, instruments which require attestation, under some statutory provision. Of the former class, the most usual are deeds and instruments executed under powers contained in and reserved by other instruments. In the other class of instruments requiring attestation, may be enumerated:—

Wills and codicils (1 Vict. c. 26).

Warrants of attorney, and cognovits (1 & 2 Vict. c. 110).

Agreements between the master of a ship and a merchant seaman (the Merchant Shipping Act, 1854, Part III.).

Deeds of composition, arrangement and inspectorship under the Bankruptcy Act, 1861, s. 192.

(Bills of sale do not seem to require any attestation, notwithstanding the language of 17 & 18 Vict. c. 36.)

Even in these cases, the necessity for calling the attesting witness only arises where it is necessary to *prove* the instrument. For the parties against whom any of these instruments requiring attestation are sought to be used, may waive the necessity for calling the attesting witness, by admissions. Thus, if in the course of the proceedings in the cause, the party voluntarily admits the execution, or if by his pleadings he does not require the execution to be proved, there is no necessity for calling the attesting witness. But where *proof* has to be given of attestation, the necessity for calling the attesting witness cannot be avoided by putting the party to the deed, and against whom it is sought to be used, into the witness-box, and extracting an admission of the execution from him (*Whyman* v. *Garth*, 8 Ex. 803).

The judges of the Court of Chancery seem unwilling to apply this enactment in *ex parte* cases (*Re Reay's Estate*, 1 Jur., N. S. 222, V. C. K., 8th March, 1855).

As to calling upon a party to admit a document, by notice to admit; and the proof by affidavit of such admission when made, see C. L. P. A. 1852, ss. 117, 118 (*ante*, pp. 101-4); and as to the form of a notice to admit, R. G., H. T. 1853, r. 29, *post*.

27. Comparison of a disputed writing with any

Comparison of disputed writing.

* By the 22 & 23 Vict. c. 35, s. 12, it is enacted, that "a deed hereafter executed in the presence of, and attested by, two or more witnesses, in the manner in which deeds are ordinarily executed and attested, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or by any instrument in writing not testamentary, notwithstanding it shall have been expressly required that a deed or instrument in writing made in exercise of such power, should be executed or attested with some additional or other form of execution or attestation or solemnity: provided always, that this provision shall not operate to defeat any direction in the instrument creating the power, that the consent of any particular person shall be necessary to a valid execution, or that any act shall be performed in order to give validity to any appointment, having no relation to the mode of executing and attesting the instrument, and nothing herein contained shall prevent the donee of a power from executing it conformably to the power, by writing or otherwise than by an instrument executed and attested as an ordinary deed, and to any such execution of a power this provision shall not extend."

writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute.

See *Birch* v. *Ridgway* (1 F. & F. 270, *cor.* Pollock, C. B.)

Semble in an action by indorsee against acceptor of a bill of exchange, where acceptor denies the indorsement of the drawer, such indorsement may be proved, under this section by comparison with the signature of the drawer upon the bill, which the acceptor is estopped from denying.

For the purpose of comparison under this section, the disputed writing must be produced in court; and this section does not therefore apply to documents which are not produced, and of which it is sought to give secondary evidence. And it has been thus decided by Wilde, B., in *Arbon* v. *Fussell* (3 F. & F. 152).

STAMPS.

Provision for stamping documents at the trial.

28. Upon the production of any document as evidence at the trial of any cause, it shall be the duty of the officer of the court, whose duty it is to read such document, to call the attention of the judge to any omission or insufficiency of the stamp; and the document, if unstamped, or not sufficiently stamped, shall not be received in evidence until the whole, or (as the case may be) the deficiency of the stamp duty, and the penalty required by statute, together with the additional penalty of one pound, shall have been paid.

This section does not, of course, interfere in any way with the right of the court or the parties to use unstamped instruments for collateral purposes only. The cases on this subject are collected in *Chitty's Statutes*, vol. iv. 3rd ed., p. 438, note (*b*).

Stamp objections by the officer of the court, are sometimes avoided by the consent of the parties to the use of copies of unstamped originals, for the officer of the court can only take such objections as the parties might have taken if this section had not been enacted (see *Travis* v. *Hargreave*, 4 F. & F. 1078, Keating, J.) If an admitted copy of a document be put in evidence, and it afterwards appears that the original was not duly stamped, the unstamped copy is still admissible (*Id.*)

In a special case relating to a policy of insurance, it appeared that the original policy was unstamped, but the parties had agreed that the case should be argued as if a stamped policy had existed, the Court of Exchequer, however, having formal notice of the defect, declined to hear the case, on the ground that the stamp laws had not been complied with (*Nixon* v. *Albion Marine Insurance Company*, L. R. 2 Ex. 338).

Counsel may still take stamp objections; and where secondary evidence of an unstamped document is tendered, such objections cannot ordinarily be taken by the officer of the court, until counsel has elicited by cross-examination the fact of its not having been stamped when last seen. See the rule as to the presumption of a document having been duly stamped discussed in *Closmadeuc* v.

Carrell (18 C. B. 36; L. J. 25, C. P. 216); and *Arbon* v. *Fussell* (11 W. R. 26; 7 L. J., N. S. 283. Ex, M. T. 1862).

An unstamped registered bill of sale may be rendered admissible in evidence under this section, by payment of the stamp duty and penalty (*Bellamy* v. *Smith*, 4 B. & S. 265; L. J. 32, Q. B. 366).

Officer of the court to receive the duty and penalty.

29. Such officer of the court shall, upon payment to him of the whole, or (as the case may be) of the deficiency of the stamp duty, payable upon or in respect of such document, and of the penalty required by statute, and of the additional penalty of one pound, give a receipt for the amount of the duty or deficiency which the judge shall determine to be payable, and also of the penalty, and thereupon such document shall be admissible in evidence, saving all just exceptions on other grounds; and an entry of the fact of such payment, and of the amount thereof, shall be made in a book kept by such officer; and such officer shall, at the end of each sittings or assizes (as the case may be), duly make a return to the Commissioners of the Inland Revenue of the monies, if any, which he has so received by way of duty or penalty, distinguishing between such monies, and stating the name of the cause and of the parties from whom he received such monies, and the date, if any, and description of the document for the purpose of identifying the same; and he shall pay over the said monies to the Receiver-general of the Inland Revenue, or to such person as the said Commissioners shall appoint or authorize to receive the same; and in case such officer shall neglect or refuse to furnish such account, or to pay over any of the monies so received by him as aforesaid, he shall be liable to be proceeded against in the manner directed by the eighth section of an act passed in the session of parliament holden in the thirteenth and fourteenth years of the reign of Her present Majesty, intituled "*An Act to repeal certain Stamp Duties, and to grant others in lieu thereof, and to amend the Laws relating to the Stamp Duties;*" and the said Commissioners shall, upon request, and production of the receipt hereinbefore mentioned, cause such documents to be stamped with the proper stamp or stamps in respect of the sums so paid as aforesaid: provided always, that the aforesaid enactment shall not extend to any document which cannot now be stamped after the execution thereof, on payment of the duty and a penalty.

13 & 14 Vict. c. 97.

No provision is made, it will be observed, for the return of the money, in the event of the judge at the trial having wrongly determined that the instrument was insufficiently stamped, and the

stamp duty and penalties having been thereupon paid by the party producing the document. Payment at the trial might be considered a waiver of any objection, and to bar any subsequent application to the court for the return of the money; and if the party tendering a document in evidence relies on its sufficiency, he should, perhaps, on the judge deciding that it is insufficient, withdraw it, and make its rejection the ground of a subsequent application for a new trial. But probably, in a very clear case, upon a memorial to the proper department of the executive government, the money would be returned.

No document under this act to require a stamp.

30. No document made or required under the provisions of this act shall be liable to any stamp duty.

No new trial for ruling as to stamp.

31. No new trial shall be granted by reason of the ruling of any judge that the stamp upon any document is sufficient, or that the document does not require a stamp.

Nor should the judge at *Nisi Prius* give leave to move upon such a ruling (*Siordet* v. *Kuczinski*, 17 C. B. 251; *Tattersall* v. *Fearnely*, 17 C. B. 368; *Cory* v. *Davis*, 14 C. B., N. S. 370; *Rutty* v. *Benthall*, L. R. 2 C. P. 488, *per* Byles, J.); unless by consent of the parties (*Eames* v. *Smith*, 1 Jur., N. S. 1025, Ex. M. T. 1855); but in *Heiser* v. *Grout* (5 H. & N. 35), the Court of Exchequer doubted if this course could be taken.

If, however, the document be formally tendered in evidence, and rejected by the judge on the ground of the insufficiency of the stamp, the ruling is, of course, still open to review (*Sharples* v. *Rickard*, 2 H. & N. 57).

Error on a Special Case.

Error may be brought on a special case.

32. Error may be brought upon a judgment upon a special case in the same manner as upon a judgment upon a special verdict, unless the parties agree to the contrary; and the proceedings for bringing a special case before the Court of Error shall, as nearly as may be, be the same as in the case of a special verdict; and the Court of Error shall either affirm the judgment or give the same judgment as ought to have been given in the court in which it was originally decided, the said Court of Error being required to draw any inferences of fact from the facts stated in such special case which the court where it was originally decided ought to have drawn.

Error may be brought on a special case, "unless the parties agree to the contrary" If, notwithstanding such agreement, error is brought, the proceedings in error will be quashed; and this whether the agreement be *express* (*Camden* v. *Edie*, 1 H. Bl. 21); or *implied*, as if, for instance, the parties have agreed to be bound by the judgment of the court below (*Brown* v. *Granville*, 2 Dowl. 796; *Garrard* v. *Tuck*, 8 C. B. 255, where the cases are collected); see also *Howell*, *Vestry Clerk*, &c. v. *London Dock Company* (8 W. R. 562, Q. B., T. T. 1860), where, it having

been agreed that a special case should be dealt with by the Court of Queen's Bench as if granted by the Quarter Sessions on appeal against a rate, an appeal from the Queen's Bench was struck out by the Court of Exchequer Chamber; and see p. 134, *ante*.

Costs are payable in all cases on quashing proceedings in error (4 Anne, c. 16, s. 25).

In a case where the Court of Exchequer Chamber reversed the judgment of the Court of Queen's Bench given on a special case, and on error being brought, the House of Lords reversed the judgment of the Court of Exchequer Chamber, the form of the judgment of the house was "that the judgment of the Court of Exchequer Chamber be reversed, and that the judgment of the Court of Queen's Bench be affirmed with costs" (*Walsh* v. *Trimmer*, L. R. 2 H. L. 220).

Error lies under this section, on a special case stated in proceedings on an interpleader issue (*Gumm* v. *Tyrie*, 6 B. & S. 298; L. J., 34 Q. B. 124).

A special case may be stated under the 3 & 4 Will. 4, c. 42, s. 25, which enables the parties "in any action or information after issue joined, by consent and by order of a judge, to state the facts of the case in the form of a special case for the opinion of the court, and to agree that a judgment shall be entered for the plaintiff or defendant, by confession of *nolle prosequi* immediately after the decision of the case, or otherwise, as the court may think fit, and judgment shall be entered accordingly."

A special case may also be stated under C. L. P. A. 1852, ss. 46, 47, 48, 179, (*ante*, pp. 50, 51, 148).

A special case may be stated by an arbitrator, or by the judge trying a cause without a jury, under ss. 4, 5, (*ante*, p. 207); but error cannot be brought upon such a special case (*Gumm* v. *Fowler*, 2 E. & E. 890; L. J. 29, Q. B. 189).

The mode of proceeding to error is regulated by C. L. P. A. 1852, ss. 146—167 (*ante*, pp. 126—138).

It seems doubtful whether a special case can be amended after judgment, and error brought thereon, unless by consent (*Notman* v. *Anchor Insurance Company*, 6 C. B., N. S. 536; see also *Ganthony* v. *Witan*, 2 Weekly Notes, 1867, p. 254, C. P. M. T.)

It also seems doubtful whether error lies upon a special case stated with some only of several defendants, where the others have allowed judgment to go by default (*Boyd* v. *Robins*, 5 C. B., N. S. 579; L. J. 28, C. P. 73).

See as to form of a special case, R. G., H. T. 25 Vict., *post*.

RULES NISI.

33. In every rule *nisi* for a new trial or to enter a verdict or nonsuit, the grounds upon which such rule shall have been granted shall be shortly stated therein. Grounds to be stated in rule *nisi* for new trial.

Where a rule *nisi*, drawn up on reading an affidavit and deposition, called on the defendant to show cause why a new trial should not be had "on the grounds set forth in the said affidavit and deposition;" it was held that this section had not been complied with; but, under the circumstances of the case, the rule was allowed to stand over for amendment (*Drayson* v. *Andrews*, 10 Exch. 472). It is a sufficient statement of the grounds, in a rule for a new trial, that "the judge's direction to the jury that the plaintiff was entitled only to nominal damages, was wrong" (*Watson* v. *Lane*, 2 Jur. N. S. 119, Ex. H. T. 1856).

In some cases, application to set aside proceedings on the ground of irregularity for instance, a rule *nisi* cannot be supported, or made absolute upon a ground different from that stated therein (*Smith* v. *Clark*, 2 Dowl. 218; *Doe* d. *Fish* v. *Macdonnell*, 8 Dowl. 488). The court in other cases, and especially applications for a new trial, has not hitherto been bound by the terms of the rule, but has moulded it to meet the justice of the case (*Bate* v. *Kensey*, 1 C. M. & R. 38; *Doe* v. *Lord*, 7 A. & E. 610; *Higgins* v. *Nicholls*, 7 Dowl. 551). The grounds on which a rule *nisi* was granted, were not in these cases specified in the rule itself.

Semble, that where a plaintiff has died intestate since the trial, a new trial cannot be moved for on behalf of his widow or next of kin without letters of administration being first taken out (*Lloyd* v. *Ogleby*, 5 C. B., N. S. 667).

Appeal on Motions to enter a Verdict or Nonsuit, or for a New Trial.

If rule *nisi* refused, party may appeal.

34. In all cases of rules to enter a verdict or nonsuit upon a point reserved at the trial, if the rule to show cause be refused or granted and then discharged or made absolute, the party decided against may appeal.

The Court of Exchequer Chamber held, that this section did not extend to cases where the point was received before the passing of this act (*Vansittart* v. *Taylor*, 4 E. & B. 910; L. J. 24, Q. B. 198).

A rule obtained upon leave reserved to move to reduce the amount of a verdict, is substantially a rule to enter a verdict within the meaning of this section (*Seeger* v. *Duthie*, 8 C. B., N. S. 72; L. J. 30, C. P. 65; *Hodgman* v. *West Midland Railway Company*, 5 B. & S. 173; L. J. 35, Q. B. 85).

Where the judges are equally divided in opinion, the rule, though strictly dropped, may be considered as discharged for the purpose of appeal under this section (*Levy* v. *Green*, 6 W. R. 209, Q. B., H. T. 1858); but the common practice in such cases, is for the junior judge to withdraw his judgment, and thus disturb the balance (*Burnett* v. *Allen*, 4 Jur. N. S. 488, Ex. T. T. 1858; *Bishop* v. *Trustees of the Bedford Charity*, 1 E. & E. 697; L. J. 28, Q. B. 220).

An appeal does not lie under either this or the following section, where a rule for a new trial is made absolute on account of such uncertainty as to the facts proved at the former trial, as to leave the court unable otherwise to do justice between the parties (*Bristow* v. *Reynolds*, 2 Jur. N. S. 790, Ex. T. T. 1856); nor does it lie where a new trial is directed by the court for the furtherance of justice in the exercise of its own discretion independently of the wish of the parties (*Abbott* v. *Feary*, 6 H. & N. 113; L. J. 29, Ex. 475).

It is not necessary, in order to give a right of appeal, that the rule be made absolute in the terms in which it was granted (*Gether* v. *Capper*, 18 C. B. 866; L. J. 25, C. P. 260).

This section has been held to apply in Interpleader (*Withers* v. *Parkes*, 4 H. & N. 524, 810); and in the case of a point reserved at a trial before an under-sheriff (*Levy* v. *Green*, 1 E. & E. 969;

L. J. 28, Q. B. 319); but it is very doubtful whether it applies to an Information of Intrusion (*Att.-Gen. of Prince of Wales* v. *Bristol Waterworks*, L. J. 24, Ex. 205); and it most probably does not apply to Indictments, though tried at *Nisi Prius* (*Reg.* v. *Inhabitants of Bedfordshire*, L. J. 24, Q. B. 86; see also *Howell, Vestry Clerk* v. *London Dock Company*, 8 W. R. 562, Q. B. T. T. 1860).

A suggestion of error under the C. L. P. A. 1852, and an appeal under this section, may be made and argued together (*Wheelton* v. *Hardisty*, 8 E. & B. 232).

The Court of Queen's Bench is to be the court of appeal, for the purposes of this section, in reference to motions for new trials, or to enter verdicts or nonsuits, which were previously made to the judges of the respective courts of common pleas at Lancaster and courts of pleas at Durham (s. 102, *post*).

A rule *nisi* having been granted to the defendant for a new trial upon the ground of the verdict being against evidence, and also to enter the verdict for him on the ground of misdirection; and the rule having been made absolute on the latter ground to enter the verdict for him, the rule as to a new trial standing over, notice was given by the plaintiff of appeal, and the defendant then signed judgment. The judgment of the court below was affirmed in error; and thereupon the defendant got an injunction in equity dissolved. The judgment was ultimately reversed in the House of Lords, and the court then, it not appearing that the plaintiff had been prejudiced, allowed the defendant to re-enter the case in the new trial paper, as to the rule for a new trial (*Betts* v. *Menzies*, 11 W. R. 88, Q. B. M. T. 1862).

As to an appeal under this section by the defendant in one of several consolidated actions other than the representative action, see *Thomas* v. *Winter*, (17 L. T. N. S. 148, C. P. M. T. 1867).

See as to the practice upon the argument, *Kingsford* v. *Merry* (1 H. & N. 503); and s. 40, and note (*post*, p. 242).

Appeal upon rule discharged or absolute.

35. In all cases of motions for a new trial upon the ground that the judge has not ruled according to law, if the rule to show cause be refused, or, if granted, be then discharged or made absolute, the party decided against may appeal, provided any one of the judges dissent from the rule being refused, or, when granted, being discharged or made absolute, as the case may be, or, provided the court in its discretion think fit that an appeal should be allowed; provided, that where the application for a new trial is upon matter of discretion only, as on the ground that the verdict was against the weight of evidence or otherwise, no such appeal shall be allowed.

See note to previous section.

Courts of Error to be courts of appeal.

36. The Court of Error, the Exchequer Chamber, and the House of Lords shall be courts of appeal for the purposes of this act.

The expression Court of Error appears to have reference to s. 102, *post*.

Compare this with C. L. P. A. 1860, s. 6, *post*.

Notice of appeal.

37. No appeal shall be allowed unless notice thereof be given in writing to the opposite party or his attorney, and to one of the masters of the court, within four days after the decision complained of, or such further time as may be allowed by the court or a judge.

This further time *may* be allowed upon application made after the four days have expired (*Dudley, Earl of* [nom. *Ward*] v. *Lumley*, 5 H. & N. 656; L. J. 29, Ex. 372); but the court will not grant it in a clear case (*Keiner* v. *Baxter*, L. R. 2 C. P. 174). See also *Watson* v. *Lane*, L. J. 25, Ex. 240).

Bail.

38. Notice of appeal shall be a stay of execution, provided bail to pay the sum recovered and costs, or to pay costs where the appellant was plaintiff below, be given, in like manner and to the same amount as bail in error, within eight days after the decision complained of, or before execution delivered to the sheriff.

See C. L. P. A. 1852, s. 151, and note (*ante*, pp. 129, 130).

Bail for costs on appeal may be required where security for the costs of the action were given in the court below (*Bouglenx* v. *Swayne*, 2 W. R. 491, Exch. T. T. 1854).

A defendant residing abroad may be required to give security for costs upon appeal (*Dudley, Earl of* v. *Lumley, ubi supra*).

Form of appeal.

39. The appeal hereinbefore mentioned shall be upon a case to be stated by the parties (and in case of difference, to be settled by the court, or a judge of the court appealed from), in which case shall be set forth so much of the pleadings, evidence, and the ruling or judgment objected to, as may be necessary to raise the question for the decision of the Court of Appeal.

See R. G., H. T., 25 Vict., *post*.

Where a rule was made absolute to enter a verdict for the defendant, and the plaintiff appealed, Byles, J. held at chambers that the defendant need not take any step towards settling the case under this section; but if the plaintiff did not do so with due promptitude, the court would compel him to do so under pain of final judgment for the defendant (*Hunt* v. *Allgood*, 3 E. & F. 155).

Rule *nisi* granted on appeal, how disposed of.

40. When the appeal is from the refusal of the court below to grant a rule to show cause, and the Court of Appeal grant such rule, such rule shall be argued and disposed of in the Court of Appeal.

Where there is an appeal against a refusal to grant a rule to show cause, and the Court of Error grants such rule, cause is to be shown in the first instance. When a preliminary objection to the appeal is to be raised, the time for objecting is when the respondent shows cause, and not till then. It is no objection to

an appeal against a refusal to grant a rule on a point reserved under s. 34 (*ante*, p. 240), that the point is not simply a point of law, but one involving law and fact, and requiring the court to draw conclusions upon the facts of the case as a jury would do (*Kingsford* v. *Merry*, 1 H. & N. 503).

41. The Court of Appeal shall give such judgment as ought to have been given in the court below; and all such further proceedings may be taken thereupon as if the judgment had been given by the court in which the record originated.

Judgment of court of appeal.

See *Caterall* v. *Hindle* (L. R. 2 C. P. 368).

It was said by Jervis, C. J., that the power to amend does not go into the court of appeal (*Johnson* v. *Goslett*, 18 C. B. 728; L. J. 25, C. P. 277); *sed quære*. Where the judges of the court of appeal are equally divided in opinion, the judgment of the court of appeal is in affirmance of that of the court below (*Hickman* v. *Cox*, 3 C. B., N. S. 523).

It would seem that pending the appeal, judgment ought not to be signed in the action (*Tyne Improvement Commissioners* v. *General Steam Navigation Company*, 2 Weekly Notes, 1867, p. 159, Q. B. E. T).

42. The Court of Appeal shall have power to adjudge payments of costs and to order restitution; and they shall have the same powers as the Court of Error in respect of awarding process and otherwise.

Powers of court of appeal as to costs and otherwise.

The ordinary practice is to adjudge costs of appeal to a successful respondent, but not to a successful appellant (*Barker* v. *Windle*, 6 E. & B. 675; *Young* v. *Moeller*, 6 E. & B. 681: see also *Levy* v. *Green*, 7 W. R. 487, Q. B. E. T. 1859).

After the decision of the court below, and after final judgment has been signed, such court has been held by Crompton, J., to have no power with reference to the costs of an appeal; and, therefore, where a defendant appealed against a decision refusing a rule, and paid the damages and costs in lieu of bail, and afterwards, and before the case was settled, abandoned his appeal, that learned judge held that the plaintiff was not entitled to his costs consequent upon such appeal (*Parr* v. *Winteringham*, 5 L. T., N. S. 361, Bail Court, M. T. 1861).

Various powers were conferred by the C. L. P. A. 1852, on courts of error (ss. 156 and 157, *ante*, pp. 133, 134). Referring to those sections, and to s. 32 and note (*ante*, pp. 238, 239), it will be seen that the court of appeal has power to quash the proceedings on appeal, in all cases in which an appeal does not lie, or where they are taken against good faith; and it may, perhaps, thence have power, independently of s. 41, *supra*, to give such judgment and award such process, as the court appealed from ought to have done, without regard to the party appealing; *sed quære*.

As to allowing interest on a judgment pending proceedings on appeal under this Act, see R. Pl. T. T. 1853, r. 26, note, and R. G. T. T. 1867, *post*.

Error upon award of trial *de novo*.

43. Upon an award of a trial *de novo* by any one of the superior courts or by the Court of Error, upon matter appearing upon the record, error may at once be brought; and if the judgment in such or any other case be affirmed in error, it shall be lawful for the Court of Error to adjudge costs to the defendant in error.

A trial *de novo* (formerly a *venire de novo*) is awarded for some defect appearing upon the face of the record; and the court can neither impose conditions on the party entitled to it, nor any terms as to costs (*Witham* v. *Lewis*, 1 Wils. 48; *Edwards* v. *Brown*, 1 Tyrw. 281). The Court of Error will decide on every question of law arising upon the record, even though error is brought thereon only as to the award of a trial *de novo* (*Carlisle* v. *Whaley*, L. R. 2 H. L. 391).

See note to C. L. P. A. 1852, s. 155 (*ante*, p. 133).

Payment of costs upon new trial on matter of fact.

44. When a new trial is granted, on the ground that the verdict was against evidence, the costs of the first trial shall abide the event, unless the court shall otherwise order.

This section modifies R. G., H. T. 1853, r. 54, *post*.

When the party who succeeded on the first trial, fails on the second, he neither pays, nor receives, the costs of the first trial (*Evans* v. *Robinson*, L. J. 24, Ex. 212).

In an action by a clerk against his employer, the declaration contained a special count for a wrongful dismissal, and the common count for work and labour. At the first trial, the plaintiff had a verdict on the special count, no claim being made on the count for work and labour. A new trial was then ordered, "the costs of the first trial to abide the event." On the second trial the defendant obtained the verdict on the special count; but the plaintiff now set up a claim on the count for work and labour, on which he had a verdict for 4*l*. 19*s*. Held, that the plaintiff was not entitled to the costs of the first trial, "the event" referred to in the rule, meaning the event of the dispute then before the court, namely, that on the special count (*Dawson* v. *Harris*, 11 C. B., N. S. 801; L. J. 31, C. P. 168).

See as to principles guiding the courts in granting new trials upon the ground of verdicts being against evidence, *Allaway* v. *Bennett* (6 Jur., N. S. 347, Ex. H. T. 1860). As to what constitutes a perverse verdict, see observations in *Adams* v. *The Great Western Railway Company* (10 W. R. 84, Ex. M. T. 1861).

Affidavits.

Affidavits on new matter.

45. Upon motions founded upon affidavits, it shall be lawful for either party, with leave of the court or a judge, to make affidavits in answer to the affidavits of the opposite party, upon any new matter arising out of

such affidavits, subject to all such rules as shall hereafter be made respecting such affidavits.

The rules of court relating to affidavits are R. G. H. T. 1853, rr. 138—148, and R. G., M. V. 1854, rr. 1, 2, *post*; but the new rules contemplated by this section have not yet been framed (see *Pritchard* v. *Leech*, 2 Jur., N. S. 475, Ex. E. T. 1856).

The leave of the court should not be applied for until the "new matter" has been brought before the court in the usual course upon the argument of the rule (see *Hayne* v. *Robertson*, 16 C. B. 554; L. J. 24, C. P. 155; and *Wood* v. *Cox*, 16 C. B. 494; L. J. 24, C. P. 155; *Swinfen* v. *Swinfen*, 1 C. B., N. S. 364). This rule seems consistent with convenience; since the further affidavits may be quite unnecessary, in which case they should not be made; but until argument it may not appear to the court whether they are, or are not necessary; besides it would only be through abuse of the courtesy of counsel *to one another*, that the "new matter" contained in affidavits in answer (which, indeed, may, very possibly, not be *used* at all) could become known to those who seek to reply to them (see *Wood* v. *Cox*, *ubi supra*; and *per* Cresswell, J., in *Swinfen* v. *Swinfen*, L. J. 26, C. P. 98).

On a rule for a new trial on the ground of the improper rejection of evidence, the affidavit in answer alleged that it was withdrawn and not rejected, it was held that an affidavit in reply stating how it came to be withdrawn, was not receivable under this section (*Whitehouse* v. *Hemmant*, L. J. 27, Ex. 295).

This enactment is confined to motions in court.

PRODUCTION OF DOCUMENTS.

Power to court or judge to direct oral examinations.

46. Upon the hearing of any motion or summons, it shall be lawful for the court or judge, at their or his discretion, and upon such terms as they or he shall think reasonable, from time to time to order such documents as they or he shall think fit to be produced, and such witnesses as they or he may think necessary to appear, and be examined *viva voce*, either before such court or judge, or before the master, and upon hearing such evidence, or reading the report of such master, to make such rule or order as may be just.

In *Roberts* v. *Evans* (6 B. & S. 2, 3, better L. J. 34, Q. B. 7), an arbitrator was ordered under this section, or s. 48 (*post*, p. 248), to attend before the master to be examined as to whether he had enlarged the time for making his award within the prescribed time; the arbitrator having refused to make an affidavit as to the fact.

In *Thomas* v. *Stutterheim* (5 W. R. 6, Q. B. M. T. 1856), the court refused, under this section, to grant a rule absolute in the first instance for the examination of a witness at the point of death; and it would seem that the section is intended only to provide evidence upon otherwise pending motions or summonses (see *Ashcroft* v. *Foulkes*, 18 C. B. 261; L. J. 25, C. P. 202).

See *Bennett* v. *Bayes* (35 L. T. 69, Ex. M. T. 1859).

Proceedings before and upon such examination.

47. The court or judge may, by such rule or order, or any subsequent rule or order, command the attendance of the witnesses named therein, for the purpose of being examined, or the production of any writings or other documents, to be mentioned in such rule or order; and such rule or order shall be proceeded upon in the same manner, and shall have the same force and effect, as a rule of the court under an act passed in the first year of the reign of his late Majesty King William the Fourth, intituled "*An Act to enable Courts of Law to order the Examination of Witnesses upon Interrogatories or otherwise;*" and it shall be lawful for the court, or judge, or master to adjourn the examination from time to time as occasion may require; and the proceedings upon such examination shall be conducted, and the depositions taken down, as nearly as may be, in the mode now in use with respect to the *vivâ voce* examination of witnesses under the last-mentioned act.

1 *Will.* 4, c. 22.

Oral examination of witnesses.

The reference to, and substantial incorporation by this and subsequent sections of, some of the provisions of the Stat. 1 Will. 4, c. 22, renders it desirable to notice that act in some detail.

1 *Will.* 4, c. 22, s. 4.

Section 4 empowers the courts of law at Westminster and the several judges thereof, "in every action* depending in such court, upon the application of any of the parties to such suit, to order the examination on oath, upon interrogatories or otherwise, before the master or prothonotary of the said court, or other person or persons to be named in such order, of any witnesses within the jurisdiction of the court where the action shall be depending, or to order a commission to issue for the examination of witnesses on oath at any place or places out of such jurisdiction, by interrogatories or otherwise, and by the same or any subsequent order or orders, to give all such directions touching time, place, and manner of such examination, as well within the jurisdiction of the court wherein the action shall be depending as without, and all other matters and circumstances connected with such examinations as may appear reasonable and just. And sect. 5 enacts, "that when any rule or order shall be made for the examination of witnesses within the jurisdiction of the court wherein the action shall be depending, by authority of this act, it shall be lawful for the court, or any judge thereof, in and by the first rule or order to be made in the matter, or any subsequent rule or order, to command the attendance of any person to be named in such rule or order for the purpose of being examined, or the production of any writings or other documents to be mentioned in such rule or order, and to direct the attendance of any such person to be at his own place of abode, or elsewhere if necessary or convenient so to do; and the wilful disobedience

Sect. 5.

* Interpleader is not an "action" within the meaning of this act (*In re Mersey Dock Board*, 11 W. R. 283, Q. B. H. T. 1863).

of any such rule or order shall be deemed a contempt of court and proceedings may be thereupon had by attachment (the judge's order being made a rule of court before or at the time of the application for an attachment*), if, in addition to the service of the rule or order, an appointment of the time and place of attendance in obedience thereto, signed by the person or persons appointed to take the examination, or by one or more of such persons, shall be also served together with or after the service of such rule or order: Provided always, that every person whose attendance shall be so required shall be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial: Provided also, that no person shall be compelled to produce, under any such rule or order, any writing or other document that he would not be compellable to produce at a trial of the cause."

By subsequent sections of the above act (s. 6, *et seq.*), power is given to remove prisoners for examination, and provision made for the examination of witnesses on oath, with power to the examiner to report to the court upon the conduct or absence of witnesses; see also ss. 56, 57, of this act (*post*, p. 263). See cases on former act collected in Chitty's Statutes, 3rd ed. vol. i. p. 1399, &c.; and Chitty's Forms, 10th ed. p. 177, n. (*a*); also *Fischer* v. *Izataray* (E. B. & E. 321; L. J. 27, Q. B. 239), where a commission was directed to a foreign court, instead of to the individual judges thereof; *Valentine* v. *Hall* (L. J. 35, Q. B. 121), where the commission issued to the judges of a foreign court, omitting the name of one of them; *Bulham* v. *Mears* (6 W. R. 597, Ex. T. T. 1858), as to the place where, and the time when, a commission was to be executed; *Hodges* v. *Cobb* (L. R. 2 Q. B. 652), as to validity of depositions taken according to the commission, but not according to the directions contained in the judge's order for the commission; *Whyte* v. *Hallett* (L. J. 28, Ex. 208); and *Grill* v. *General Iron Screw Collier Company* (L. R. 1 C. P. 600), as to practice, irregularity and waiver; *Adams* v. *Corfield* (L. J. 28, Ex. 31), where it was held no answer to an application for a commission to examine witnesses abroad, that the opposite party deposed that there were in this country persons and documents, accessible to the applicant, which would supply him with any information he could obtain from the witnesses he proposed to examine;—and that after a judge had exercised his discretion on such an application, the court would not disturb his decision unless it were manifestly wrong; *Barry* v. *Barclay* (15 C. B. N. S. 849), where the court required the applicant to state what he expected the witnesses to prove.

See R. G., H. T. 1853, r. 33, *post*.

The rule or order will not be made absolute in the first instance, even after notice of intended application, and where the witness is at the point of death (*Thomas* v. *Stutterheim*, 5 W. R. 6, Q. B., M. T. 1856).

The application should be made on the affidavit of the party applying (*Fischer* v. *Hahn*, 13 C. B., N. S. 659; L. J. 32, C. P. 209); it may be made by the plaintiff before an appearance is entered (*Id.*)

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* See *Hill* v. *Glen* (26 L. T. 62 and 107, Ex. M. T. 1855); and *Windle* v. *Lane* (L. J. 29, Ex. 245).

Costs.
1 Will. 4, c. 22, s. 9.

With respect to costs, the Stat. 1 Will. 4, c. 22, s. 9, enacts "that the costs of every rule or order to be made for the examination of witnesses under any commission or otherwise by virtue of this act, and of the proceedings thereupon shall" (except in the case of writs or commissions to judges, &c., in India and the colonies, in the case of actions in the common law courts of this country, which are left to the discretion of the court), "be costs in the cause, unless otherwise directed, either by the judge making such rule or order, or by the judge before whom the cause may be tried, or by the court." As to what costs will be allowed under this section, see *Beaufort, Duke of*, v. *Lord Ashburnham* (13 C. B., N. S. 598; L. J. 32, C. P. 97); *Ridley* v. *Sutton* (1 H. & C. 741); and *Lecocq* v. *S. E. Railway Company* (7 B. & S. 415); and as to the applicant being required to give security for costs, see *Fischer* v. *Hahn* (13 C. B. N. S. 659). See also s. 57 (*post*, p. 263), and Gray on Costs, p. 363.

Sect. 10.

With regard to the admissibility of such depositions in evidence, it is provided by the Stat. 1 Will. 4, c. 22, s. 10, "that no examination or deposition to be taken by virtue of this act shall be read in evidence at any trial without the consent of the party against whom the same may be offered, unless it shall appear to the satisfaction of the judge,* that the examinant or deponent is beyond the jurisdiction of the court, or dead, or unable from permanent sickness† or other permanent infirmity to attend the trial; in all or any of which cases the examinations and depositions certified under the hand of the commissioners, master, prothonotary, or other person taking the same, shall and may, without proof of the signature to such certificate, be received and read in evidence saving all just exceptions." This section is practically incorporated in s. 55 (*post*, p. 262).

As to obtaining the attendance of witnesses residing in Ireland or Scotland, see 17 & 18 Vict. c. 34, APPENDIX, *post*.

As to enforcing the attendance of witnesses before commissioners, under commissions issued out of her majesty's courts in other parts of her dominions, see 6 & 7 Vict. c. 82, ss. 5, 6, and 7 (APPENDIX, *post*); *R.* v. *Alexander* (8 Jur. 380, E. T. 1844, Bail C.); and *R.* v. *Jennell* (2 D. & L. 21).

As to a mandamus issuing to a colonial court commanding them to take evidence, see *Brunton* v. *Hardy* (10 W. R. 562, Ex. E. T. 1862); and *Farnworth* v. *Hyde* (10 C. B. N. S. 719).

EXAMINATION OF UNWILLING WITNESSES.

Examination of person who refuses to make an affidavit.

48. Any party to any civil action or other civil proceeding in any of the Superior Courts, requiring the affidavit of a person who refuses to make an affidavit, may apply by summons for an order to such person to appear and be examined upon oath‡ before a judge or

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* The court will not interfere with the discretion of the judge exercised under this section, unless he has been misled by false evidence (*Beaufort, Duke of* v. *Crawshay*, L. R. 1 C. P. 699). It would appear that the affidavit of the witness's ordinary medical attendant is sufficient evidence (*Id.*)

† "Permanent sickness" means such as to preclude the hope of the deponent attending the trial within a reasonable time (*Id.*)

‡ Or upon affirmation, see s. 20 (p. 229), *ante*.

master, to whom it may be most convenient to refer such examination, as to the matters concerning which he has refused to make an affidavit; and a judge may, if he think fit, make such order for the attendance of such person before the person therein appointed to take such examination, for the purpose of being examined as aforesaid, and for the production of any writings or documents to be mentioned in such order, and may therein impose such terms as to such examination, and the costs of the application and proceedings thereon, as he shall think just.

See note to s. 46 (*ante*, p. 245).

Proceedings upon order for examination.

49. Such order shall be proceeded upon in like manner as an order made under the hereinbefore-mentioned act passed in the first year of the reign of his late Majesty King William the Fourth, and the examination thereon shall be conducted, and the depositions taken down and returned, as nearly as may be, in the mode now used on *vivâ voce* examinations under the said act of parliament.

See the note to s. 47 (*ante*, pp. 246—248).

DISCOVERY.

Discovery of documents.

50. Upon the application of either party to any cause or other civil proceeding in any of the Superior Courts, upon an affidavit by such party* of his belief that any document,† to the production of which he is entitled for the purpose of discovery or otherwise, is in the possession or power of the opposite party, it shall be lawful for the court or judge to order that the party against whom such application is made,‡ or if such party is a body corporate, that some officer to be named of such body corporate, shall answer on affidavit, stating what documents he or they has or have in his or their possession or power relating to the

* An affidavit by the attorney for a party abroad, has been held not to satisfy this requirement (*Herschfield* v. *Clark*, 11 Exch. 712; *Christopherson* v. *Lottinga*, 15 C. B., N. S. 809; L. J. 33, C. P. 121). If, however, the party seeking discovery is a corporation aggregate the affidavit may be made by their attorney, as they would otherwise be deprived of the benefit of the section (*Kingsford* v. *G. W. Railway Company*, 16 C. B., N. S. 761; L. J. 33, C. P. 307, explaining *Christopher* v. *Lottinga*, *ubi supra*).

† The affidavit must show the possession of some document to the production of which the applicant is entitled (*Evans* v. *Louis*, L. R. 1 C. P. 656).

‡ Where the defendant obtained an order of Willes, J., for discovery under this section, on its appearing that the plaintiff was in Australia, and that his wife was carrying on the action by his authority, Williams, J., varied the order by allowing the affidavit of the wife and attorney to be substituted for that of the plaintiff (*Burnett* v. *Hooper*, 1 F. & F. 412, 467).

matters in dispute, or what he knows as to the custody they or any of them are in, and whether he or they objects or object (and if so, on what grounds) to the production of such as are in his or their possession or power; and, upon such affidavit being made, the court or judge may make such further order thereon as shall be just.

It is essential to distinguish between the right to *discovery*, and the narrower right to *inspection*. This section provides primarily for the former; and is in aid of the 14 & 15 Vict. c. 99, s. 6 (see *post*, p. 252), which enlarged the old common law right to the latter. It would thence seem that an order for *discovery* should only be made where there is reasonable ground to suppose that the *discovery*, if ordered, may be followed by *inspection* under the former act, or by "further order" under the concluding provisions of this section (but see *Forshaw* v. *Lewis*, 10 Excb. 712); and thus the right to *discovery* under this section may be considered as something narrower than that recognized in equity, where a defendant may be compelled to discover, in a general way, his intended defence (see Mitford's Pleadings in Chancery; Wigram on Discovery; *Attorney-General* v. *Corporation of London*, 12 Beav. 8; *Hunt* v. *Elmes*, 27 Beav. 62; L. J. 28, Ch. 680, and cases there cited; *Gomm, dem.* v. *Parrott, ten.*, 3 C. B., N. S. 47).

General rules.

In order to make a successful application under this section, three leading points must be attended to.

1. The document must be in the "possession or power of the opposite party," and this must be shown with reasonable certainty (*Hewett* v. *Webb*, 2 Jur., N. S. 1189, Q. B., M. T. 1856; *Bray* v. *Finch*, 1 H. & N. 568; *Thompson* v. *Robson*, 2 H. & N. 412; *Houghton* v. *London and County Assurance Company*, 17 C. B. N. S. 80; and *Evans* v. *Louis*, L. R. 1 C. P. 656).

2. It must relate to "the matters in dispute."

3. It must be a document "to the production of which the applicant is entitled for the purpose of discovery or otherwise."

This is to be so construed, as to limit the right to *discovery* by that to *inspection*, as above pointed out.

Inspection at common law.

It had long been the practice of the courts, in the exercise of their equitable jurisdiction, to grant inspection of any instrument on which the plaintiff sought to charge the defendant as a party to such instrument (*Ratcliffe* v. *Bleasby*, 3 Bing. 148), when only one part of the instrument had been executed, and the party holding it, was consequently trustee for both (*Blogg* v. *Kent*, 6 Bing. 614; *Devonoge* v. *Bouverie*, 8 Bing. 1; *Doe* d. —— v. *Slight*, 1 Dowl. 163; *Doe* d. *Morris* v. *Roe*, 1 M. & W. 207); so where a counterpart had been lost (*Street* v. *Brown*, 6 Taunt. 302); so of letters, where no copies had been kept, and where the action was based upon the letters (*Price* v. *Harrison*, 8 C. B., N. S. 617; L. J. 29, C. P. 335; *Stone* v. *Strange*, 3 H. & C. 541; L. J. 34, Ex. 72); see also *Woodcock* v. *Worthington* (2 Y. & J. 4); *Neale* v. *Swind* (2 Cr. & J. 278); *Travis* v. *Collins* (2 Cr. & J. 625). The holder must have been a party, or identical with a party, to the action (*Doe* d. *Morris* v. *Roe*, 1 M. & W. 207). He must have been in a position to be regarded as a trustee for the party requiring inspection (*Ratcliffe* v. *Bleasby*, *ubi supra*;

Cocks v. *Nash*, 9 Bing. 723): thus an agent has been compelled to grant inspection of books to his principal (*Jones* v. *Palmer*, 4 Dowl. 446); and even to give copies also of alleged private memoranda, which were made by him in the course of his employment (*Bishop of Winchester* v. *Bowker*, 29 Beav. 479); but discovery will not be ordered of books which are clearly the private property of the agent (*Colyer* v. *Colyer*, L. J. 30, Ch. 408); an attorney has been obliged to grant inspection of a case to his client (*Evans* v. *Delegal*, 4 Dowl. 374); a member of a provisional committee to grant inspection of the subscriber's agreement to an allottee (*Steadman* v. *Arden*, 15 M. & W. 587); a company suing an alleged shareholder for calls, to grant inspection to him of the registry of shares, allotment and agenda books in the possession of the company (*Lancashire Cotton Spinning Company* v. *Greatorex*, 14 L. T. N. S. 290, Ex. E. T. 1866); a railway company to grant inspection of all their minutes relating to the employment of a servant, in an action by him for wrongful dismissal (*Hill* v. *The G. W. Railway Company*, 10 C. B., N. S. 148); the trustees under a composition deed, framed under s. 192 of the Bankruptcy Act, 1861, to grant inspection to a creditor of the assents to the deed (*Andrew* v. *Pell*, L. R. 2 C. P. 251); a shipowner suing an underwriter, to grant inspection of documents in any way relating to the subject-matter of the policy sued on (*Rayner* v. *Ritson*, 6 B. & S. 888; L. J. 35, Q. B. 59); see *Kellock* v. *Home and Colonial Insurance Society* (12 Jur. N. S. 653, Ex. T. T. 1866), as to what inspection the underwriter is bound to grant in such an action.

As to what inspection a railway company will be ordered to grant in an action against them for negligence causing death, see *Baker* v. *L. & S. W. Railway Company* (2 Weekly Notes, 1867, p. 285, Q. B. M. T.; *post*, p. 254).

Where a judge has made an order for inspection, the courts are very reluctant to interfere with the discretion he has exercised (*Lancashire Cotton Spinning Company* v. *Greatorex*, *ubi supra*).

The party requiring inspection must have been a party, or he must have made title under a party, to the instrument (*Smith* v. *Winter*, 3 M. & W. 309; *Lawrence* v. *Hooker*, 5 Bing. 6; *Cocks* v. *Nash*, 9 Bing. 723); and a cause or proceeding must have been commenced (*In re Burton* and *The Saddler's Company*, L. J. 31, Q. B. 62).

Inspection was granted to enable a party to frame his pleading, or to support his action or defence, as the case might be, though the document was not declared upon (*Steadman* v. *Arden*, *ubi supra*); but it was not granted for other purposes.

It has been refused when sought for as a foundation for a plea in abatement (*Beale* v. *Bird*, 2 D. & R. 419); also where the object was to discover alleged forgeries (*Chetwind* v. *Marnell*, 1 B. & P. 271; *Hildyard* v. *Smith*, 1 Bing. 451). But see *Wolner* v. *Devereux* (9 Dowl. 672), where Tindal, C. J., takes it for granted that a suggestion of forgery, or an allegation that the instrument had been dealt with since it was executed, or the party swearing that he had no recollection of having made a note, would be ground for an inspection. It has been decided that an allegation that the plaintiff procured bills by fraud, is no ground for an application (*Threlfall* v. *Webster*, 1 Bing. 161). Inspection has been refused when asked with a view to the discussion of a rule for a new trial (*Wood* v. *Morewood*, 9 Dowl. 44; and see *Pratt* v.

Goswell, 9 C. B., N. S. 706); and inspection of a partnership deed, which the plaintiff had refused to execute, was refused to him, in a suit brought by him for breach of the agreement to take him into partnership; as he was no party to the deed (*Ratcliffe* v. *Bleasby*, 3 Bing. 148). So inspection of letters re-delivered by the defendant to the plaintiff, and which he alleged contained a release of his promise, was refused; the plaintiff not being a trustee (*Goodliff* v. *Fuller*, 14 M. & W. 4). Inspection will be refused where the object is to enforce penalties (see cases on forfeiture *infra*, and *Chauncey* v. *Tahourden*, 2 Atk. 392; *Bullock* v. *Richardson*, 11 Ves. 373; and *Pritchett* v. *Smart*, 7 C. B. 629). Where title to land came into question in an action of trespass, inspection was refused (*Pickering* v. *Noyes*, 1 B. & C. 262). But a defendant in ejectment, brought upon a forfeiture, has been allowed inspection of the leases under which he claimed (*Doe* d. *Child* v. *Roe*, 1 E. & B. 279). A plaintiff in ejectment, brought upon a forfeiture strictly so called, would be refused inspection; though otherwise he would seem entitled to it, *e. g.*, in the case of a conditional limitation over of the estate (see Wigram on Discovery, 134; *Boteler* v. *Allington*, 3 Atk. 453; and *Attorney-General* v. *Duplessis*, 2 Ves. sen. 286; see also *Riccard* v. *Inclosure Commissioners*, 4 E. & B. 329; L. J. 24, Q. B. 49; *Coster* v. *Baring*, 2 C. L. R. 811, C. P. T. T. 1854; and *Pye* v. *Butterfield*, 5 B. & S. 829; L. J. 34, Q. B. 17, decided under s. 51, *post*, p. 257).

If the document is not under the control of the party, an order will not be made (*Liddell* v. *Norton*, Kay, Appendix, xi.; L. J. 23, Ch. 169); but the lien of the party's attorney is no answer to an application for inspection (*Ley* v. *Barlow*, 1 Exch. 800; see also *Ex parte Shaw*, Jacob, 272; *Rodick* v. *Gandell*, 10 Beav. 270); and where the person entitled to the lien is willing to allow inspection, the party cannot resist an order, as the privilege of lien can only be taken advantage of by the person entitled to it.

It appears that the abolition of profert and oyer, and the nature of the substituted proceeding, render the judges more liberal in the exercise of this equitable jurisdiction, even if they do not incidentally enlarge it (see *per* Lord Campbell in *Doe* d. *Child* v. *Roe*, 1 E. & B. 279; and *per* Willes, J., in *The Penarth Harbour, &c. Company* v. *Cardiff Waterworks Company*, 7 C. B., N. S. 816; L. J. 29, C. P. 230).

The principles of the common law as to inspection have been enlarged by the 14 & 15 Vict. c. 99, s. 6, and by particular statutes.

Inspection under 14 & 15 Vict. c. 99, s. 6.

The 14 & 15 Vict. c. 99, s. 6, enacts "that whenever any action or other legal proceeding shall henceforth be pending in any of the superior courts of Common Law at Westminster or Dublin, or the Court of Common Pleas for the county palatine at Lancaster, or the Court of Pleas for the county of Durham, such Court and each of the Judges thereof may respectively, on application made for such purpose by either of the litigants, compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such action or other legal proceeding, and, if necessary, to take examined copies of the same, or to procure the same to be duly stamped, in all cases in which, previous

to the passing of this act, a discovery might have been obtained by filing a bill, or by any other proceeding in a Court of Equity at the instance of the party so making application as aforesaid to the said Court or Judge."

Very many cases have been decided upon this section, the most important of which still is, *Hunt* v. *Hewitt* (7 Exch. 236; L. J. 21, Ex. 210). The power given to the courts by this enactment, is to allow not a discovery, but an inspection of the documents in the custody of the opposite party, with certain restrictions or limitations. Firstly, there must be a suit or other proceeding pending; secondly, the documents must relate to such action, suit or other proceeding, that is to say, they must be materially relevant thereto (*Mansell* v. *Feeney*, 2 Johns. & H. 320); and thirdly, the cases in which inspection is to be granted, must be such as those where inspection could be obtained upon a bill for discovery in Chancery (*Hunt* v. *Hewitt*, *ubi supra*; *Gomm, dem.* v. *Parrott, ten.*, 3 C. B., N. S. 47). A party is not entitled to search the other party's papers with a view of finding out some invalidity in the case put forward by him (*Shadwell* v. *Shadwell*, 6 C. B., N. S. 679; L. J. 28, C. P. 315); nor for the purpose of enabling him to rebut the anticipated case of the other party (*Hunt* v. *Hewitt*, *ubi supra*; *Wright* v. *Morrey*, 11 Exch. 209; L. J. 24, Ex. 259; and *Riccard* v. *Inclosure Commissioners*, 4 E. & B. 329; L. J. 24, Q. B. 49: and compare *British Empire Company* v. *Somes*, at Law, 5 W. R. 489, Q. B. E. T. 1857, with *S. C.* in Chancery, 3 K. & J. 433; 5 W. R. 813; *Shadwell* v. *Shadwell*, *ubi supra*; and *London Gas Light Company* v. *Chelsea (Vestry)*, 6 C. B., N. S. 411; L. J. 28, C. P. 275; *Jones* v. *Hargreaves*, L. J. 29, Ex. 368; and as to the time of application, see also cases *infra*). He can inspect those papers, and those only, that may directly or "indirectly" (*Daniel* v. *Bond*, 9 C. B. N. S. 716), support the case on which he himself relies (*Rayner* v. *Allhusen*, 2 L. M. & P. 605; L. J. 21, Q. B. 68; *Galsworthy* v. *Norman*, 2 L. M. & P. 608; L. J. 21, Q. B. 70; *Scott* v. *Walker*, 2 E. & B. 555; *Collins* v. *Yates*, L. J. 27, Ex. 150 [libel]; *Reynoldson* v. *Morton*, 36 L. T. 462, Q. B. T. T. 1860; *Coleman* v. *Truman*, L. J. 28, Ex. 5): but the right to such inspection, when so far established, is not affected by the consideration that the documents also go to make out the case of the party who holds them (*Coster* v. *Baring*, 2 C. L. R. 811, C. P. T. T. 1854; *London Gas Light Company* v. *Chelsea Vestry*, *ubi supra*). Inspection has been refused where sought for the purpose of procuring evidence in another action (*Temperley* v. *Willett*, 6 E. & B. 380); of discovering the insolvency of a company (in which defendant was a member), so as to support a plea of justification in an action of defamation (*Met. Saloon Omnibus Company* v. *Hawkins*, 4 H. & N. 146).

In an action by a consignee of goods against shipowners for damage sustained in consequence of the unseaworthiness of the ship, the Court made an order for the plaintiff to inspect and take copies of certain surveys made on the ship in a foreign port, a general average statement, the shipwright's bill for repairs done to the ship, the captain's protest, and the log-book, as being documents proximately connected with the matter in issue (*Daniel* v. *Bond*, 9 C. B., N. S. 716). As to inspection in an action on a policy of marine insurance, see *ante*, p. 251. In an action for title-deeds: plea, that the title-deeds belonged to P., deceased, under whom the plaintiff claimed, and P., being indebted to N., agreed

with N. that N. should hold them as a security by way of equitable mortgage; and that N. so held them, the debt remaining unpaid; and that N. died, and appointed defendant his executrix. In answer to interrogatories, the defendant admitted that she had in her possession a memorandum that the deeds should remain in the possession of N. until repayment of the money: held, that the plaintiff was entitled to an inspection of the memorandum; and also to have particulars of the lien relied upon by the defendant (*Owen* v. *Nickson*, 3 E. & E. 602; L. J. 30, Q. B. 125). In an action for breach of promise of marriage, the defendant was allowed inspection of the letters he had written to the plaintiff (*Stone* v. *Strange*, 3 H. & C. 541, L. J. 34, Ex. 72; *Chute* v. *Blennerhasset*, 16 Ir. C. L. R. App. ix. C. P.) In an action under Lord Campbell's Act against a railway company for the negligence of their servants causing death, the defendants pleaded an accord and satisfaction by payment of a sum of money to the deceased; the Court of Queen's Bench upheld a judge's order, giving the plaintiffs liberty to inspect the reports made to the company by a medical man and by a clerk respectively, who had been sent by the company to visit the deceased in relation to the accident. (*Baker* v. *L. & S. W. Railway Company*, 2 Weekly Notes, 1867, p. 285, Q. B. M. T.; 16 W. R. 126).

In an action of libel contained in various letters the defendant was allowed to take *fac-simile* copies of the letters "by photograph or otherwise" (*Davey* v. *Pemberton*, 11 C. B. N. S. 628).

See also cases cited (*ante*, pp. 250, 251).

It is impossible to lay down any general rules as to when inspection will be granted, "the whole question appears to be in a state of darkness and confusion" (*per* Dr. Lushington, *The Macgregor Laird*, L. R. 1 Ad. & Ecc. 307); all that can be said is that the court or judge when they have the whole facts of the case before them, will use their discretion in allowing or refusing inspection.

As to inspection of copyhold rolls by a tenant, see R. G. H. T. 1853, r. 31, *post*, and note.

The principal cases in equity, on the subject of discovery and inspection, in addition to others already cited, are *Smith* v. *Duke of Beaufort* (1 Hare, 507; 1 Phillips, 209); *Bolton* v. *Corporation of Liverpool* (1 M. & K. 88; 3 Sim. 487). See also *Short* v. *Mercier* (3 Mac. & G. 205); *Hunt* v. *Elmes* (27 Beav. 62; L. J. 28, Ch. 680); *Adams* v. *Lloyd* (3 H. & N. 351); *Lind* v. *Isle of Wight Ferry Company* (8 W. R. 540, V. C. W. T. T. 1860); *Quin* v. *Ratcliff* (9 W. R. 65, V. C. S. M. T. 1860); and *Mertens* v. *Haigh* (1 John, 735); *Clinch* v. *Financial Corporation* (L. R. 2 Eq. 271); *Hopkinson* v. *Lord Burghley* (L. R. 2 Ch. 447). A court of equity will, in a proper case, make an order for the inspection by a shareholder or a contributory of the books of a banking company in liquidation, in spite of a secrecy clause in the deed of settlement (*In re Birmingham Banking Company*, 15 L. T. N. S. 203, M. T. 1866, M. R.)

Affidavit on which to apply.

The old mode of obtaining inspection ought to be adopted, with such alterations as the nature of the case requires.* When an inspection is opposed, an affidavit is necessary as to all the disputed facts; and if all are disputed, the affidavit ought to state

* See as to applying for inspection, before declaration, *Jones* v. *Hargreaves* (L. J. 29, Ex. 365).

as sufficient a case, in all respects, to entitle the party to inspect, as would have been necessary to obtain that inspection which the court had before and still has power to grant at common law (*Pepper* v. *Chambers*, 7 Exch. 226; L. J. 21, Ex. 81). The affidavit ought not only to show that an action is pending, but ought also to state not a mere suggestion, but circumstances sufficient to satisfy the court or judge, that there are in the possession, or under the control, of the opposite party, certain documents, and that these are relevant to such action, and to the case of the party seeking to inspect them (*Hunt* v. *Hewitt*, 7 Exch. 226). A party is not entitled, by alleging that his opponent has documents in his possession, to call on him to answer by affidavit, whether he has any such documents in his possession relating to the matters in question, and, if any, to specify what they are (*Rayner* v. *Allhusen*, 2 L. M. & P. 605; and *Galsworthy* v. *Norman*, *Id.* 608).

The affidavit must state such facts as would enable the applicant, by a bill of discovery, to obtain inspection of the documents. The right of the plaintiff (in equity) is limited, firstly, to a discovery confined to a question in the cause; secondly, to such material documents as relate to the proof of the plaintiff's case on the trial. It does not extend to the discovery of the manner in which the defendant's (in equity) case is to be established, or to evidence which relates exclusively to his case. The party applying must show, firstly, what is the nature of the suit, and of the question to be tried in it; and he should also depose to his having just ground to maintain or defend it; and, secondly, the affidavit ought to state with sufficient distinctness the reason of the application, and the nature of the documents, in order that it may appear to the court or judge that the documents are asked for, in order to enable the party applying to support his own case, and not merely to find a flaw in the case of his opponent; and also that the opponent may admit or deny the possession of them (*Hunt* v. *Hewitt*, *ubi supra*).

Inspection has been ordered of books kept at a private lunatic asylum under 8 & 9 Vict. c. 100 (*Hill* v. *Philip*, 7 Exch. 232; *Ruck* v. *Stilwell*, 4 H. & N. 468).

As to inspection of property under C. L. P. A. 1854, see s. 58, (*post*, pp. 263, 264).

Inspection under other statutes.

As to inspection under 15 & 16 Vict. c. 83, s. 42 (Patents), see *Jones* v. *Lee* (L. J. 25, Ex. 241); *Patent Type Founding Company* v. *Walter* (John. 727), where refused at law (*Patent Type Founding Company* v. *Lloyd*, 5 H. & N. 192; L. J. 29, Ex. 207); see also *Amies* v. *Kelsey* (L. J. 22, Q. B. 84); *Shaw* v. *Bank of England* (L. J. 22, Ex. 26 and 210); *Holland* v. *Fox* (3 E. & B. 977; L. J. 23, Q. B. 211 and 537); and *Vidi* v. *Smith* (3 E. & B. 969; L. J. 23, Q. B. 342).

There are also provisions for inspection contained in statutes regulating companies and other public bodies, which see *pro re natâ*; and, among other cases, *Reg.* v. *Mariquita, &c. Mining Company* (1 E. & E. 289; L. J. 28, Q. B. 67); *Meader* v. *Isle of Wight Ferry Company* (9 W. R. 750, Ex. T. T. 1861).

As to inspection of public documents, parochial and corporation books and court rolls, see Chitty's Practice, 12th ed. pt. 5, c. xv.; and as to the latter, see also R. G. H. T. 1853, r. 31, *post*. As to granting a mandamus at the suit of a member of a corporation to inspect the minutes of the Court of Assistants, when no actual

suit, but only a specific dispute, was pending; see *In re Burton and The Saddlers' Company* (L. J. 31, Q. B. 62).

Practice.

Upon an order for inspection of documents, a place for inspection should be named. If in an action, the order may be made before issue joined (*Rogers* v. *Turner*, L. J. 21, Ex. 8); and even before plea (*Forshaw* v. *Lewis*, 10 Exch. 712). Under the common order in Chancery for inspection by "agent," it was held by Stuart, V. C., that an accountant might be employed (*Draper* v. *Manchester Railway Company*, L. J. 30, Ch. 95); but see same case on appeal (*Id.* 236). An accountant may be included in a special order (*Bonnardet* v. *Taylor*, 1 John. & H. 383). As to inspection by an expert, *e. g.*, of plans by a surveyor, see *Swansea Vale Railway Company* v. *Budd* (L. R. 2 Eq. 274).

In an action against a joint-stock company, the court or judge may order one of the late directors (the company having ceased to carry on business) to give the plaintiff inspection of documents, which are not denied by such director to be in his possession, or under his control (*Lacharme* v. *The Quartz Rock Mariposa Gold Mining Company*, 1 H. & C. 134; L. J. 31, Ex. 335, 508).

As to answer by a corporation, see *Ranger* v. *The G. W. R. Company* (4 De G. & J. 74; L. J. 28, Ch. 741); also *The Attorney-General* v. *The Mystery of Mercers* (9 W. R. 83, W. V. C. M. T. 1860); *Clinch* v. *Financial Corporation* (L. R. 2 Eq. 271).

The opposite party, upon an application for *inspection*, may answer the affidavit by swearing that he has no such documents, or that they relate exclusively to his own case, or that he is for sufficient reason privileged from producing them (*Hill* v. *Philip*, 7 Exch. 232; *Pritchett* v. *Smart*, 7 C. B. 629; *Short* v. *Mercier*, 3 Mac. & G. 205; and other cases cited *supra*); or he may submit to show parts covering the remainder, on an affidavit that the part concealed does not in any way relate to the other party's case (*Hunt* v. *Hewitt*, 7 Exch. 226; *Bull* v. *Clarke*, 15 C. B. N. S. 851). The court is not bound by the denial of the party from whom inspection is sought, that the documents relate to the case of his adversary; but if the court can collect from all the materials before them, that the documents do not go to establish the case of the applicant, they will refuse inspection (*Chartered Bank of India, &c.* v. *Rich*, 4 B. & S. 73; L. J. 32, Q. B. 300). See also *Felkin* v. *Lord Herbert* (L. J. 30, 1 Ch. 798), as to sufficiency of answer to discovery. *Semble*, that privilege from inspection is not necessarily a sufficient answer to an application for discovery (*Forshaw* v. *Lewis*, 10 Exch. 712); *sed quære.*

Where a clergyman employed persons to act for him as brokers in dealings of a stock-jobbing kind, and in a suit for an account sought a discovery of the dealings between them; it was held, that they could not protect themselves by alleging that the discovery would subject them to the penalties imposed by 57 Geo. 3, c. 40, on persons acting as brokers in the city of London without a licence, it not being stated that the plaintiff was aware of the defendants not being qualified (*Robinson* v. *Kitchen*, 8 D. G., Mac. & G. 88).

As to confidential communications, see *Colman* v. *Trueman* (3 H. & N. 871), where, upon a plea of fraud, inspection was ordered of correspondence between plaintiffs and their agents. See also *Wolley* v. *Pole, P. O.* (14 C. B., N. S. 533; L. J. 32,

C. P. 263); *Chartered Bank of India, &c.* v. *Rich* (*ubi supra*); and *Lee* v. *Hammerton* (10 L. T. N. S. 730; V. C. K. T. T. 1864). Communications between attorney and client, though passing through a lay agent of the client reasonably employed in that behalf, have been held to be privileged (*Hooper* v. *Gumm*, 2 John. & H. 602); so are the opinions of counsel (*Jenkyns* v. *Bushby*, L. R. 2 Eq. 547; *Underwood* v. *Secretary of State for India*, L. J. 35, Ch. 545, V. C. W. & L. J. J.; see *Walsham* v. *Stainton* 2 H. & M. 1; and *Nichol* v. *Jones*, 2 H. & M. 588); so are the reports of an accountant employed by the defendant's solicitor (*Walsham* v. *Stainton*, *ubi supra*).

The costs of *inspection* are generally ordered to be paid by the party applying, and the costs of the *application* to be costs in the cause; but as there is no general *rule* upon the subject (*Stilwell* v. *Ruck*, 4 H. & N. 468), the order should provide for the costs (*Smith* v. *G. W. R. Company*, 6 E. & B. 405; L. J. 25, Q. B. 279); otherwise none can be recovered. As to allowing the costs of an expert, see *Churton* v. *Frewen* (2 Weekly Notes, 1867, p. 101; 16 L. T., N. S. 171, M. V. C).

INTERROGATORIES.

Power to deliver written interrogatories to opposite party,

51. In all causes* in any of the Superior Courts, by order of the court or a judge, the plaintiff may, with the declaration, and the defendant may, with the plea, or either of them by leave† of the court or a judge, may, at any other time, deliver to the opposite party or his attorney (provided such party, if not a body corporate, would be liable to be called and examined as a witness upon such matter) interrogatories in writing upon any matter as to which discovery may be sought, and require such party, or, in the case of a body corporate, any of the officers of such body corporate,‡ within ten days to answer the questions in writing by affidavit, to be sworn and filed in the ordinary way; and any party or officer omitting, without just cause, sufficiently to answer all questions as to which a discovery may be sought within the above time, or such extended time as the court or a judge

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* Interrogatories may be delivered in interpleader issues, under 1 & 2 Will. 4, c. 58 (*White* v. *Watts*, 12 C. B., N. S. 267; L. J. 31, C. P. 381).

† This is very obscurely framed: in practice, leave is invariably required, whether the interrogatories be delivered with the declaration, or with the plea, or "at any other time." Compare s. 52 (*post*, p. 261). The *time* of the application is not so material as its other circumstances; but, ordinarily, the application for leave to deliver interrogatories should not be made until after issue joined, when the court or judge is better able to form an opinion as to their relevancy and propriety: see *Jones* v. *Platt* (6 H. & N. 697; L. J. 30, Ex 365); *Morris* v. *Parr* (6 B. & S. 203; L. J. 34, Q. B. 95). See also *James* v. *Barnes* (17 C. B. 596). When the application is made at such "other time," the affidavit in support may be required to *disclose* merits (*Martin* v. *Hemming*, 10 Exch. 478, *sed quære*; see *James* v. *Barnes*, *ubi supra*).

‡ This has been held to extend to the public officer of a joint-stock bank under 7 Geo. 4, c. 46 (*M'Kewan, P. O.* v. *Rolt*, 4 H. & N. 738; L. J. 28, Ex. 288; see also *Mason* v. *Wythe, Clerk to Middle Level Commissioners*, 3 F. & F. 153).

shall allow, shall be deemed to have committed a contempt of the court, and shall be liable to be proceeded against accordingly.

It appears upon the construction of this section—coupling together the liability "to be examined as a witness upon such matter," with the right to interrogate "upon any matter as to which discovery may be sought"—that such interrogatories are not within the meaning of this section:—

Interrogatories not admissible.

1. As seek *exclusively* for the case of the other side (*Carew* v. *Davis*, 5 E. & B. 709; *Whately* v. *Crawford*, 5 E. & B. 709; *Edwards* v. *Wakefield*, 6 E. & B. 463; *Horton* v. *Bott*, 2 H. & N. 249 (ejectment); *Moor* v. *Roberts*, 2 C. B., N. S. 671; L. J. 26, C. P. 247; *Adams* v. *Lloyd*, 3 H. & N. 351; *London Gaslight Company* v. *Chelsea Vestry*, 6 C. B., N. S. 411; L. J. 28, C. P. 275; *Simpson* v. *Smith*, L. R. 2 C. P. 293); and see a distinction well taken in *Thol* v. *Leask* (10 Exch. 704).

2. As are of a merely fishing character (*Moor* v. *Roberts*, *ubi supra*; *Atter* v. *Willison*, 7 W. R. 265, Ex. H. T. 1859; *Peppiatt* v. *Smith*, 3 H. & C. 129; L. J. 33, Ex. 82).

3. As are not reasonably relevant to the issue (*Robson* v. *Cooke*, 2 H. & N. 766). In an action for breach of *contract* whereby the plaintiff's patent became void, and the defendant had paid money into court, interrogatories as to the amount of damage incurred by the plaintiff were refused as irrelevant (*Jourdain* v. *Palmer*, L. R. 1 Ex. 102); but in an action of *tort*, for pirating copyright, the defendant was allowed to interrogate the plaintiff as to the amount of damage he had sustained so as to guide the defendant as to the amount he might fairly pay into court (*Wright* v. *Goodlake*, 3 H. & C. 540; L. J. 34, Ex. 82). In an action for injury caused by negligence, the defendant was not allowed to interrogate the plaintiff as to the amount and circumstances of the injury (*Peppiatt* v. *Smith*, *ubi supra*). But the rule laid down in the last case does not appear to be generally acted on.

4. As are unnecessary, or useless (*Bird* v. *Maltby*, 1 C. B., N. S. 308).

5. As seek to establish a forfeiture strictly so called (*May* v. *Hawkins*, 11 Exch. 210; L. J. 24, Ex. 309; *Horton* v. *Bott*, *ubi supra*, distinguishing *Flitcroft* v. *Fletcher*, L. J. 25, Ex. 94; *Pye* v. *Butterfield*, 5 B. & S. 829; L. J. 34, Q. B. 17); and see *United States of America* v. *McRae* (L. R. 4 Eq. 327).

6. As seek to contradict a written instrument (*Moor* v. *Roberts*, *ubi supra*).

7. As are privileged upon grounds of public interest (see principle explained in *Beatson* v. *Skene*, 8 W. R. 544, Ex. T. T. 1860).

Interrogatories admissible.

But interrogatories may be admissible:—

1. The answers to which may expose other persons to actions (*Tetley* v. *Easton*, 18 C. B. 643; L. J. 25, C. P. 293).

2. The answers to which may expose the party interrogated to penalties (*Osborn* v. *London Dock Company*, 10 Exch. 698; L. J. 24, Ex. 140; *Bickford* v. *Darey*, L. R. 1 Ex. 354, explaining *Baker* v. *Lane*, 3 H. & C. 544; L. J. 34, Ex. 57); although the party interrogated may except upon his answer to the objectionable questions (see *Scott* v. *Miller*, 1 John. 220; *S. C.* L. J. 28, Ch. 584; *Bartlett* v. *Lewis*, 12 C. B., N. S. 249; L. J. 31, C. P. 230); but see *Tupling* v. *Ward* (6 H. & N. 749; L. J. 30, Ex.

222). See, further, the authorities cited in note to section 25 (*ante*, p. 234).

3. Where a defendant in ejectment seeks to discover the character in which the plaintiff claims, and the pedigree upon which he relies (*Flitcroft* v. *Fletcher*, L. J. 25, Ex. 94). But the Court of Common Pleas has since refused to allow such interrogatories unless the defendant can show from circumstances that he is wholly unacquainted with the plaintiff's title (*Stoate* v. *Rew*, 14 C. B., N. S. 209; L. J. 32, C. P. 160; *Pearson* v. *Turner*, 16 C. B., N. S. 157; L. J. 33, C. P. 224; *Blyth* v. *L'Estrange*, 3 F. & F. 154; and see *Ingilby* v. *Shafto*, 33 Beav. 31).

The Court of Exchequer has refused in general to extend the principle acted upon in *Flitcroft* v. *Fletcher* (*ubi supra*), to other actions (*Finney* v. *Forwood*, L. R. 1 Ex. 6).

The Court of Queen's Bench allowed a plaintiff in ejectment to interrogate the defendant as to whether he were the real defendant, and if not, as to who was the real defendant (*Sketchley* v. *Conolly*, 11 W. R. 573, E. T. 1863).

4. That seek secondary evidence of lost written documents (*Wolverhampton Waterworks Company* v. *Hawksford*, 5 C. B., N. S. 703; L. J. 28, C. P. 198); but it should be observed that the answers to these interrogatories were not to be used at the trial unless the loss of the documents in question was proved, so as to allow of secondary evidence being given.

5. That inquire into confidential communications that the party interrogated would not be privileged from disclosing upon oral examination (*Thol* v. *Leask*, 10 Exch. 704; *Colman* v. *Truesen*, 3 H. & N. 871).

See extent of privileged communications in the case of an attorney discussed by Romilly, M. R. in *Ford* v. *Tennant* (32 Beav. 162).

6. That seek to disprove the bona fides of a primâ facie defence (*Bayley* v. *Griffiths*, 1 H. & C. 429; L. J. 31, Ex. 477); or to show that the defendant has acted fraudulently (*Blight* v. *Goodcliffe*, 18 C. B., N. S. 757).

The courts have a general discretion in the matter of allowing interrogatories (*Tupling* v. *Ward*, *ubi supra*; *Stern* v. *Sevastopulo*, 14 C. B., N. S. 738; L. J. 32, C. P. 268, *per* Erle, C. J.): thus, in an action of slander, the plaintiff was not allowed to interrogate the defendant (*Stern* v. *Sevastopulo*, *ubi supra*), but where otherwise the plaintiff would have been without redress they were allowed (*Atkinson* v. *Fosbrooke*, L. R. 1 Q. B. 628); but they have been allowed in actions for malicious prosecution (*Zychlinski* v. *Maltby*, 10 C. B., N. S. 838; *Stewart* v. *Smith*, L. R. 2 C. P. 293). As to what interrogatories may be delivered to an executor who has pleaded *plene administravit*; see *Peck* v. *Nolan* (14 Ir. C. L. R. App. xxxii. Ex.). The courts will be guided in their discretion by the *principles* on which Courts of Equity allow discovery, but with the necessary modifications required by the difference of subject-matter (*Flitcroft* v. *Fletcher*, *Blyth* v. *L'Estrange*, *ubi supra*; *Edwards* v. *Wakefield*, 6 E. & B. 463; *Horton* v. *Bolt*, 2 H. & N. 249; L. J. 26, Ex. 267; *Adams* v. *Lloyd*, 3 H. & N. 351; L. J. 27, Ex. 499; *Pye* v. *Butterfield*, 5 B. & S. 829; *Hawkins* v. *Carr* and *Parsons* v. *Carr*, L. R. 1 Q. B. 89; *Jourdain* v. *Palmer*, L. R. 1 Ex. 102; *Bickford* v. *Darcy*, L. R. 1 Ex. 354).

See further upon this subject the note to s. 50 (*ante*, pp. 250—256), Wigram on Discovery and Petheram on Interrogatories.

Practice.

Interrogatories may be delivered by the defendant to the plaintiff, although the plaintiff is a foreigner and out of the jurisdiction of the court (*Pohl* v. *Young*, L. J. 25, Q. B. 23, B. C. *per* Erle, J.).

It has been said (*Zariß* v. *Thornton*, L. J. 26, Ex. 214), that the forms of interrogatories, and the particular interrogatories to be allowed, might be *settled* at chambers; but see *contra*, *Robson* v. *Cooke* (2 H. & N. 766); *Tupling* v. *Ward* (6 H. & N. 749); and *Phillips* v. *Lewin* (L. J. 34 Ex. 37).

As to affidavit in support of application to deliver interrogatories, see s. 52 (*infra*); as to proceedings upon order, see ss. 53—56 (*post*, pp. 261—263); and as to costs, see s. 57 (*post*, p. 263).

As to obtaining an attachment for refusal to answer interrogatories, see s. 54, n. (*post*, p. 262).

It may be gathered from the above cases, that the common practice is to give leave to deliver not interrogatories generally, but certain particular and approved interrogatories; and that thus the judges have to determine not merely that the circumstances of the case are such as to render the administration of interrogatories generally proper, but also that the particular interrogatories proposed are themselves severally proper. This double proceeding, if carefully applied, would necessarily take up much of the valuable time of the judge at chambers; but, in practice, substantial injustice to the suitor, who seeks to interrogate his opponent, is the more common evil; as it is oftentimes next to impossible for a judge to make himself acquainted, upon an interlocutory application made amid the hurry and confusion of his chambers, with the bearing of particular questions on the perhaps complicated matters in dispute in such actions, as those generally are, in which parties are advised to have recourse to interrogatories; and it is even, when not difficult, still very inexpedient, in many cases, to parade before one's opponent, who probably will have to frame the answers, the hoped-for results of questions, which are only sought to be put when other means of evidence have failed. It would seem better that, when the judge has ascertained that the circumstances of the action show that the delivery of some interrogatories is a reasonable proceeding, he should leave it to the party interrogating to put at his own costs such questions as may be advised; and to the party interrogated to except at his risk (s. 53, *post*, p. 261) to such questions as he is advised not to answer. This practice would be more convenient and useful in practice, more congruous with that *in consimili casu* in Chancery, more consistent with the terms of the whole enactment (including s. 53), and even more conformable with the terms of the ordinary judge's order made under it; and it would, moreover, seem to be countenanced by *Osborn* v. *London Dock Company* (10 Exch. 698); *Chester* v. *Wortley* (18 C. B. 239); and *James* v. *Barnes* (17 C. B. 596).

With respect to the mode of proving at the trial the answers made to interrogatories, it should be observed that Martin, B. held, at *Nisi Prius*, that an office copy of an affidavit filed in the cause, was not admissible in evidence against the party who made it; that the original affidavit must be produced and the party's handwriting thereto proved (*Barnes* v. *Parker*, 15 L. T., N. S. 218, M. T. 1866). *Sed quære.*

Affidavits by

52. The application for such order shall be made

upon an affidavit of the party proposing to interrogate, and his attorney or agent,* or, in the case of a body corporate, of their attorney or agent, stating that the deponents or deponent believe or believes that the party proposing to interrogate, whether plaintiff or defendant, will derive material benefit in the cause from the discovery which he seeks, that there is a good cause of action or defence upon the merits,† and if the application be made on the part of the defendant, that the discovery is not sought for the purpose of delay; provided that, where it shall happen from unavoidable circumstances, that the plaintiff or defendant cannot join in such affidavit, the court or judge may, if they or he think fit, upon affidavits of such circumstances by which the party is prevented from so joining therein, allow and order that the interrogatories may be delivered without such affidavit.‡

Party proposing to interrogate, and his attorney.

53. In case of omission, without just cause, to answer sufficiently such written interrogatories, it shall be lawful for the court or a judge, at their or his discretion, to direct an oral examination of the interrogated party, as to such points as they or he may direct before a judge or master; and the court or judge may by such rule or order, or any subsequent rule or order, command the attendance of such party or parties before the person appointed to take such examination, for the purpose of being orally examined as aforesaid, or the production of any writings or other documents to be mentioned in such rule or order, and may impose therein such terms as to such examination, and the costs of the application, and of the proceedings thereon, and otherwise, as to such court or judge shall seem just.

Oral examination of parties, when to be allowed.

As to what constitutes "just cause," see notes to ss. 50, 51 (*ante*, pp. 250—260); and *Turk* v. *Syne* (L. J. 27, Ex. 54); *Geary* v. *Buxton* (L. J. 29, Ex. 280).

The answers should follow the order of the interrogatories, and answer, or assign reasons for not answering each interrogatory specifically (*Chester* v. *Wortley*, 18 C. B. 239). As the answer must be made by affidavit, the requirements of R. G., M. V. 1854, r. 2, *post*, must be complied with. See as to sufficiency of

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* Where a party sues in person the affidavit of the attorney or agent will be dispensed with (*Oxlade* v. *N. E. Railway Company*, 12 C. B., N. S. 350).

† This applies to plaintiffs, as well as defendants (*May* v. *Hawkins*, 11 Exch. 210): as to *disclosing* merits, see *Martin* v. *Hemming* (10 Exch. 478); *Croomes* v. *Morrison* (5 E. & B. 984); and better, *contra*, *James* v. *Barnes* (17 C. B. 596; *S. C.* L. J. 25, C. P. 182).

‡ This latter proviso renders unnecessary the application to the present section of the interpretation put upon s. 51 in *M'Kewan* v. *Rolt* (4 H. & N. 738; L. J. 28, Ex. 381; *ante*, p. 257, n.).

answers about documents, *Adams* v. *Lloyd* (3 H. & N. 351; L. J. 27, Ex. 499). It has been held that a party interrogated is not bound to set out the contents, or copies of documents admitted by his answer to be in his possession; but that application for such purpose must be made under s. 50 (*ante*, p. 249; *Scott* v. *Zygomala*, 4 E. & B. 483; L. J. 24, Q. B. 129); *sed quære*.

The application for an order under this section should be made promptly (*Chester* v. *Wortley*, *ubi supra*).

The rule is *nisi* only in the first instance (*Turk* v. *Syne*, *ubi supra*.

See also *Swift* v. *Nun* (L. J. 26, Ex. 365).

Applications under this section should be made at chambers in the first instance (*Bender* v. *Zimmerman*, L. J. 29, Ex. 244; *Meadows* v. *Kirkman*, 2 L. T., N. S. 251, Ex. E. T. 1860).

Proceedings upon such rule or order.

54. Such rule or order shall have the same force and effect, and may be proceeded upon in like manner, as an order made under the said hereinbefore-mentioned act passed in the first year of the reign of his late Majesty King William the Fourth.

See note to s. 47 (*ante*, pp. 246, 247).

Not duly answering interrogatories is already a contempt of court under sect. 51 (*ante*, p. 257); and the use of this section is in expediting and facilitating process.

A rule for attachment under this section, was refused where the attorney of a foreigner had been served with interrogatories, and default was made in answering them; but it did not appear that the foreigner personally knew of the order, or was within the jurisdiction (*Von Hoff* v. *Hoerster*, L. J. 27, Ex. 299; see also *Windle* v. *Lane*, L. J. 29, Ex. 245; *Curran* v. *Elphinstone*, 4 W. R. 50, Q. B., M. T. 1855; *Hill* v. *Glen*, 26 L. T. 62, 107, Ex. M. T. 1855; and *Seafield* (*Lord*) v. *Pratt*, 5 L. T., N. S. 674; Q. B., H. T. 1862.

In an action by a bank during liquidation, the defendant had obtained leave to interrogate certain directors of the bank and a stay of proceedings till the interrogatories were answered; it was held that the official liquidator, although not a party to the record was entitled to an attachment against the directors on their refusal to answer (*Madrid Bank, Limited* v. *Bayley*, L. R. 2 Q. B. 37).

Examination of Witnesses under this Act.

Depositions upon such examinations to be returned to master's office.

55. Whenever, by virtue of this act, an examination of any witness or witnesses has been taken before a judge of one of the said Superior Courts, or before a master, the depositions taken down by such examiner shall be returned to and kept in the master's office of the court in which the proceedings are pending; and office copies of such depositions may be given out, and the depositions may be otherwise used, in the same manner as in the case of depositions taken under the hereinbefore-mentioned act passed in the first year

of the reign of his late Majesty King William the Fourth. 1 Will. 4, c. 22.

See note to s. 47 (*ante*, p. 248).
See R. G., H. T. 1853, r. 33, *post*.

Examiner may make special report to the court.

56. It shall be lawful for every judge or master named in any such rule or order as aforesaid for taking examinations under this act, and he is hereby required to make, if need be, a special report to the court in which such proceedings are pending, touching such examination, and the conduct or absence of any witness or other person thereon or relating thereto; and the court is hereby authorized to institute such proceedings and make such order and orders upon such report as justice may require, and as may be instituted and made in any case of contempt of the court.

Costs of rule and examination to be in the discretion of the court.

57. The costs of every application for any rule or order to be made for the examination of witnesses by virtue of this act, and of the rule or order and proceedings thereon, shall be in the discretion of the court or judge by whom such rule or order is made.

This and the preceding section follow the language of the Stat. 1 Will. 4, c. 22, ss. 8, 9); see note to s. 47 (*ante*, p. 247).

If the order does not provide for costs, none can be had; see *Smith* v. *G. W. R. Company* (6 E. & B. 405; L. J. 25, Q. B. 279); and *Stilwell* v. *Ruck* (4 H. & N. 468); whence it would seem that this section applies to proceedings under section 51 (*ante*, p. 257).

INSPECTION OF PREMISES AND CHATTELS.

Inspection by jury or parties or witnesses.

58. Either party shall be at liberty to apply to the court or a judge for a rule or order for the inspection by the jury, or by himself, or by his witnesses, of any real or personal property, the inspection of which may be material to the proper determination of the question in dispute; and it shall be lawful for the court or a judge, if they or he think fit, to make such rule or order upon such terms as to costs and otherwise as such court or judge may direct: provided always, that nothing herein contained shall affect the provisions of "The Common Law Procedure Act, 1852," or any previous act, as to obtaining a view by a jury: provided also, that all rules and regulations now in force and applicable to the proceedings by view under the said last-mentioned act shall be held to apply to proceedings for inspection by a jury under the provisions of this act, or as near thereto as may be.

By the C. L. P. A. 1852, s. 114 (*ante*, p. 100), the former writ of view was abolished, and a new proceeding substituted.

The removal of obstructions to inspection, may be ordered as incident thereto (*Bennett* v. *Griffiths*, 3 E. & E. 467; L. J. 30, Q. B. 98); see also *White* v. *Storey* (43 L. T. 91, Ex. T. T. 1867).

See also an order for inspection of real property made in Chancery by Stuart, V. C., and revised by the Lords Justices in *Ennor* v. *Barwell* (8 W. R. 300; *S. C.* on appeal, 1 De G. F. & J. 529).

Inspection under Patent Act.

A somewhat similar power to grant *inspection* was conferred on the Courts of Common Law by the Patent Law Amendment Act, 1852, s. 42. Under that statute it has been held that an application to inspect the defendant's machinery may be made before the delivery of the declaration, in an action for infringement of the plaintiff's patent; but such inspection will not be granted as of course, or without the party applying for it showing that the inspection is material for the purposes of the action (*Amies* v. *Kelsey*, L. J. 22, Q. B. 84, Bail Court, Crompton, J.). In an action for the infringement of a patent, the court would not, under the above section of the Patent Law Amendment Act, 1852, grant an order for an inspection of a machine in a second action, after a first action in which inspection by the plaintiff and two scientific witnesses had been had (*Shaw* v. *Bank of England*, L. J. 22, Ex. 210). The affidavit in support should at least allege that there is such a machine, and that the plaintiff has reason to believe it an infringement of his patent; and it has been held not to be sufficient to allege merely "that the machine used by the defendant is the same for which the plaintiff has obtained a patent" (*Shaw* v. *Bank of England*, L. J. 22, Ex. 26).

In an action for infringement of a patent relating to type; inspection and delivery for the purpose of analysis, of a portion of the type used by the defendant, has been ordered in Chancery (*Patent Type Founding Company* v. *Walter*, John. 727) after it had been refused at law (*Patent Type Founding Company* v. *Lloyd*, 5 H. & N. 192). See *Holland* v. *Fox* (3 E. & B. 977; L. J. 23, Q. B. 211, 357); *Vidi* v. *Smith* (3 E. & B. 969. L. J. 23, Q. B. 342); and *Meadows* v. *Kirkman* (L. J. 29, Ex. 205).

Rule or order for summoning jury.

59. The several courts, or any judge thereof, may make all such rules or orders upon the sheriff or other person as may be necessary to procure the attendance of a special or common jury for the trial of any cause or matter depending in such courts, at such time and place, and in such manner, as they or he may think fit.

Attachment of Debts.

Examination of judgment debtor as to debts due to him.

60. It shall be lawful for any creditor who has obtained a judgment in any of the Superior Courts to apply to the court or a judge for a rule or order that the judgment debtor should be orally examined as to any and what debts are owing to him before a master of the court, or such other person as the court or judge shall appoint; and the court or judge may make such rule or order for the examination of such judgment

debtor, and for the production of any books or documents, and the examination shall be conducted in the same manner as in the case of an oral examination of an opposite party before a master under this act.

The service of the rule or order should either be personal, or be brought to the knowledge of the judgment debtor (*Mason* v. *Muggeridge*, 18 C. B. 642).

As to the oral examination, see s. 53 (*ante*, p. 261).

See as to cases in which the judge may refuse to interfere, upon the ground that the remedy would be worthless or vexatious, C. L. P. A. 1860, s. 28, *post*.

As to attachment for disobedience to an order made under this section, see *Hill* v. *Glen* (26 L. T. 62, 107, Ex. M. T. 1855).

Judge may order an attachment of debts.

61. It shall be lawful for a judge, upon the *ex parte* application of such judgment creditor, either before or after such oral examination, and upon affidavit by himself or his attorney stating that judgment has been recovered, and that it is still unsatisfied,* and to what amount, and that any other person is indebted to the judgment debtor, and is within the jurisdiction, to order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment debtor shall be attached to answer the judgment debt; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the judge or a master of the court, as such judge shall appoint, to show cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt.

Semble, the order for *attachment* under the earlier part of this section may be sustained, although the court discharge an order for *payment* to the execution creditor (*Sparks* v. *Younge*, 8 Ir. Com. Law Rep. 251, Ex., where the cases are collected and discussed by Pigott, C. B.).

A party to an interpleader issue, who has obtained an order for his costs, is a judgment creditor within this section (*Hartley* v. *Shemwell*, 1 B. & S. 1; L. J. 30, Q. B. 223).

An executor of a judgment creditor, who has not made him-

* A judgment debt cannot be said to be unsatisfied within the meaning of this section, when the judgment debtor has been taken in execution under a ca. sa. (*Jourdain* v. *Parker*, 6 H. & N. 431; L. J. 30, Ex. 237); and where the plaintiff has sued in a county court the judgment debtor on his judgment in the superior court, and has obtained an order for payment by instalments, some of which have been paid, the court will not make an attachment order under this section (*Jones* v. *Jenner*, L. J. 25, Ex. 319); but a judgment creditor is not prevented from obtaining an order for attaching a debt due to his debtor, by reason of the garnishee having been taken and remaining in execution for that debt by the first judgment debtor (*Marples* v. *Hartley*, *Hartley* v. *Shemwell*, 1 B. & S. 1; L. J. 30, Q. B. 223).

self a party to the judgment, cannot proceed under this section (*Baynard* v. *Simmons*, 5 E. & B. 59; L. J. 24, Q. B. 253).

As a general rule, where a judgment debt remains unsatisfied, if the execution debtor could maintain against the intended garnishee an action to recover the debt, which the execution creditor seeks to attach, an attachment order may be obtained under this section, provided the execution creditor could sue out a writ of *fi. fa.* against the execution debtor (*Jones* v. *Jenner*, L. J. 25, Ex. 319; *per* Bramwell, B., and *Miller* v. *Mynn*, 1 E. & E. 1075; *S. C. sub nom. Miller* v. *Wynn*, L. J. 28, Q. B. 324).

Debts attachable.

The following are instances of debts held to be attachable:—

A *debt* of unascertained amount (*id certum*, &c.) (*Daniel* v. *M'Carthy*, 7 Ir. Com. Law Rep. 261, Q. B.).

A debt due to one or more of several joint judgment debtors (*Miller* v. *Mynn*, *ubi supra*).

A debt due, but not payable until a future time (*Sparks* v. *Younge*, 8 Ir. Com. Law Rep. 251, Ex.: the judgment in this case merits attention).

The proceeds of an execution in the hands of the sheriff (*Murray* v. *Simpson*, 8 Ir. Com. Law Rep. App. xlv. Ex.).

Rent due in the hands of a tenant (*Mitchell* v. *Lee*, L. R. 2, Q. B. 259).

Funds in the hands of the official manager of a company in course of being wound up, may be attached by a judgment creditor of the company (*Ex parte Turner, Re Warwick and Worcester Railway Company*, 2 De G. & J. 354; L. J. 30, Ch. 93); but see *De Winton* v. *Brecon, Mayor, &c.* (28 Beav. 200), as to the consequences of obtaining under a garnishee order, but without leave of the Court of Chancery, payment by a receiver of monies which he had been directed by the Court of Chancery to pay over to the judgment debtor.

A debt due to the estate of a deceased, is attachable upon a judgment against his executor *qua* executor (*Burton* v. *Roberts*, 6 H. & N. 93; L. J. 29, Ex. 484); and payment may be enforced notwithstanding a decree for administration made subsequent to the order for attachment (*Fowler* v. *Roberts*, 2 Giff. 226).

It would seem that the pension, as distinguished from half pay, of a retired Indian officer is liable to be attached (*Dent* v. *Dent*, L. R. 1 P. & D. 366).

Debts not attachable.

The following debts, or rather alleged debts, have been held not to be attachable under this section:—

A bond of indemnity against costs, given by a third person to the judgment debtor (upon a nonsuit), to induce him to bring the action against the judgment creditor (*Johnson* v. *Diamond*, 11 Ex. 73; L. J. 24, Ex. 217, *sci. fa.*).

Debts *bonâ fide* assigned by the judgment debtor before judgment (*Hirsch* v. *Coates*, 18 C. B. 757); or before the order for attachment (*Wise* v. *Birkenshaw*, L. J. 29, Ex. 240; and see, as to foreign attachments out of the Mayor's Court, *Webster* v. *Webster*, 31 Beav. 393; L. J. 31, Ch. 655).

Money paid into court in an action brought by the judgment debtor, but wherein judgment has not been obtained (*Jones* v. *Brown*, 29 L. T. 79, C. P. E. T. 1857).

Money in the hands of a receiver under the Court of Chancery (*Ames* v. *Birkenhead Docks*, 20 Beav. 332; and see *De Winton* v. *Brecon, Mayor, &c., ubi supra*).

Superannuation allowance payable, under a mere resolution of

the board of directors, to a clerk of the East India Company, under 53 Geo. 3, c. 155, s. 93 (*Innes* v. *East India Company*, 17 C. B. 351), upon the ground of its being informally granted, and hence a mere gratuity. See *Dent* v. *Dent* (*ubi supra*).

A debt due to judgment debtors, who, by act of parliament, were bound to pay their creditors, *pari passu* (*Kennett* v. *Westminster Improvement Commissioners*, 11 Exch. 349.)

A debt due to the wife of the judgment debtor, upon a specialty given to her *dum sola* (*Dingley* v. *Robinson*, L. J. 26, Ex. 55).

A verdict, before judgment, in an action for breach of contract, for unliquidated damages (*Jones* v. *Thompson*, 1 E. & B. 63).

A verdict, before judgment, in an action upon a policy of marine insurance, where attached *quâ* verdict (*Dresser* v. *Jones*, 6 C. B., N. S. 429; L. J. 28, C. P. 281).

A dividend payable in bankruptcy (*Boys* v. *Simpson*, 8 Ir. Com. Law Rep. 523, Ex.; *Gilmour* v. *Simpson*, *Ib.* App. xxxviii., Ex.; *Dawson* v. *Malley*, L. R. Ir. 1 Ex. 207).

The mere probability of money becoming due, as in the case of accruing salary, is not attachable as an *accruing* debt.

Order for attachment to bind debts.

62. Service of an order that debts due or accruing to the judgment debtor shall be attached, or notice thereof to the garnishee, in such manner as the judge shall direct, shall bind such debts in his hands.

From the time of service, the order binds the attached debts in the hands of the garnishee, but subject to the operation of the Bankrupt Law Consolidation Act, 1849, s. 184; and, therefore, if the judgment debtor becomes bankrupt before the debt is actually paid under the order, the debt passes to his assignees and the attachment fails (*Holmes* v. *Tutton*, 5 E. & B. 65; and see *Turner* v. *Jones*, 1 H. & N. 878; *Tilbury* v. *Brown*, L. J. 30, Q. B. 46). As to the effect of the judgment debtor making an assignment for the benefit of his creditors, see *Wood* v. *Dunn* (L. R. 1 Q. B. 77; reversed in Ex. Ch., L. R. 2 Q. B. 73).

An attachment overrides the *general* lien of an attorney, or rather his right to the equitable interference of the court (*Hough* v. *Edwards*, 1 H. & N. 171; see also *Verity* v. *Wyld*, 4 Drew. 427; L. J. 28, Ch. 561; and *The Olive*, 1 Sw. Adm. Rep. 423); but where a judgment creditor received from a garnishee the amount of his claim, before an order for payment, and *with notice* of the *particular* lien (or rather equitable right) of the attorney of the judgment debtor for his costs in the action, he was compelled to refund to the attorney (*Eisdell* v. *Coningham*, L. J. 28, Ex. 213; see also *Sympson* v. *Prothero*, L. J. 27, Ch. 671).* See as to pro-

* By the 23 & 24 Vict. c. 127, s. 28, it is enacted that, "in every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter or proceeding in any court of justice, it shall be lawful for the court or judge before whom any such suit, matter or proceeding has been heard, or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made, such attorney or solicitor shall have a charge upon and against, and a right to payment out of the property, of whatsoever nature, tenure or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges and expenses of or in reference to such suit, matter or proceeding; and it shall be lawful for such court or judge to make such

tection of persons having a lien or charge upon the debt attached in the hands of the garnishee, C. L. P. A. 1860, ss. 29—31, *post*.

It seems doubtful whether notice of a prior attachment out of the Mayor's Court, London, interferes with the operation of an order under this section; it certainly does not when such notice is served out of the limits of the city (*Newman* v. *Rook*, 4 C. B. N. S. 434); and it has been held (*Redhead* v. *Wilton*, 29 Beav. 521; better L. J. 30, Ch. 577), that a foreign attachment out of the Mayor's Court creates no priority in the administration of assets in Chancery.

The order served should be strictly regular (*Cooper* v. *Blayne*, L. J. 27, Ex. 446).

Proceedings to levy amount due from garnishee to judgment debtor.

63. If the garnishee does not forthwith pay into court the amount due from him to the judgment debtor, or an amount equal to the judgment debt, and does not dispute the debt due or claimed to be due from him to the judgment debtor, or if he does not appear upon summons, then the judge may order execution to issue, and it may be sued forth accordingly, without any previous writ or process, to levy the amount due from such garnishee towards satisfaction of the judgment debt.

See forms of *fi. fa.* in R. G., M. V. 1854, Sched. 22 and 23, *post*.

A composition deed executed by a garnishee under s. 192 of the Bankruptcy Act, 1861, is a bar to an execution issued against him under this section, to the same extent that it is a bar to an execution on a judgment (*Kent* v. *Tomkinson*, L. R. 2 C. P. 502).

Judge may allow judgment creditor to sue garnishee.

64. If the garnishee disputes his liability, the judge, instead of making an order that execution shall issue, may order that the judgment creditor shall be at liberty to proceed against the garnishee by writ, calling upon him to show cause why there should not be execution against him for the alleged debt, or for the amount due to the judgment debtor, if less than judgment debt, and for costs of suit; and the proceedings upon

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order or orders for taxation of and for raising and payment of such costs, charges and expenses out of the said property, as to such court or judge shall appear just and proper: and all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right, shall, unless made to a *bond fide* purchaser for value without notice, be absolutely void and of no effect as against such charge or right: provided always, that no such order shall be made by any such court or judge in any case in which the right to recover payment of such costs, charges and expenses is barred by any statute of limitations."

The court will make an order under this section even though the estate of the client, who had died, was being administered in chancery (*Wilson* v. *Hood*, 3 H. & C. 148; L. J. 33 Ex. 304). The section has been held to apply to the Court of Admiralty (*The Phillipine*, L. R. 1 Ad & Ecc. 309; *The Jeff. Davis*, 17 L. T. N. S. 151, M. T. 1867). In this latter case Dr. Phillimore held that a garnishee order attaching an amount decreed to be paid, did not override the lien given by this section to the attorney.

See also R. G., H. T. 1853, r. 63, *post*.

such writ shall be the same, as nearly as may be, as upon a writ of revivor issued under "The Common Law Procedure Act, 1852."

The dispute must be substantial (*Newman* v. *Rook*, 4 C. B., N. S. 434), and *bonâ fide* (*Wise* v. *Birkenshaw*, L. J. 29, Ex. 240).

A writ was refused in *Richardson* v. *Greaves* (10 W. R. 45, Ex. M. T. 1861); where an action for the same cause was already pending between the judgment debtor and the garnishee, and no collusion was shown.

The costs of proceeding by writ under this section abide the event, and no order is necessary under s. 67 (*post*, p. 270); *Johnson* v. *Diamond* (11 Exch. 431).

If the judgment creditor declines to proceed by writ, the attachment may be discharged, and the judgment creditor be ordered to pay the costs (*Wintle* v. *Williams*, 3 H. & N. 288); but the court will, unless quite satisfied that the debt is not liable to attachment, allow the judgment creditor to proceed by writ (*Seymour* v. *Corporation of Brecon*, L. J. 29, Ex. 243).

See forms of proceedings, R. G., M. V. 1854, sched. 24—31, *post*.

65. Payment made by or execution levied upon the garnishee under any such proceeding as aforesaid shall be a valid discharge to him as against the judgment debtor to the amount paid or levied, although such proceeding may be set aside or the judgment reversed. Garnishee discharged.

Semble, that payment by the garnishee to the judgment creditor, upon notice of *attachment*, is no discharge of the debt due from the garnishee to the judgment debtor; but there must be a judge's order for *payment* (*Turner* v. *Jones*, 1 H. & N. 878; see also *Lockwood* v. *Nash*, 18 C. B. 536).

As to payment under a garnishee order where the defendant has become bankrupt or executed a composition deed, see s. 62, n. (*ante*, p. 266).

A garnishee order cannot be reviewed in the Court of Admiralty; and therefore the payment, under a garnishee order, of costs pronounced due to a successful party by decree of the Court of Admiralty, is satisfaction of the decree (*The Olive*, 1 Sw. Adm. Rep. 423).

It has been held in Ireland, where a judgment creditor had obtained a charging order, attaching the dividends on stock in the books of the Bank of Ireland, which order had been duly served upon the Bank, that the Bank was responsible for the payment of such dividends to another judgment creditor, who, subsequently to the date of such charging order, had obtained in another Court, not only another charging order attaching, but also an absolute order for the payment of such dividends (*Salaman* v. *Donovan*, 10 Ir. Com. Law Rep., App. xiii. Q. B.).

See as to rights of persons claiming a lien or charge upon the debt attached in the hands of the garnishee, C. L. P. A. 1860, ss. 29—31, *post*.

See form of a plea of attachment in Bullen and Leake's Precedents of Pleadings, 2nd edit., p. 428.

66. In each of the Superior Courts there shall be Attachment

Book to be kept by the masters of each court.

kept at the master's office a debt attachment book, and in such book entries shall be made of the attachment and proceedings thereon, with names, dates and statements of the amount recovered, and otherwise; and the mode of keeping such book shall be the same in all the courts; and copies of any entries made therein may be taken by any person, upon application to any master.

Costs of application.

67. The costs of any application for an attachment of debt under this act, and of any proceedings arising from or incidental to such application, shall be in the discretion of the court or a judge.

See *Wintle* v. *Williams*, 3 H. & N. 288, cited s. 64, n. (*ante*, p. 269).

The usual form of a garnishee order contains no direction as to costs.

MANDAMUS.

Action for mandamus to enforce the performance of duties.

68. The plaintiff in any action in any of the Superior Courts, except replevin and ejectment, may indorse upon the writ and copy to be served a notice that the plaintiff intends to claim a writ of mandamus, and the plaintiff may thereupon claim in the declaration, either together with any other demand which may now be enforced in such action, or separately, a writ of mandamus commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested.

The "duty" that a defendant may, under this section, be commanded to fulfil, must be one of a public, or *quasi* public nature; as well as one in which the plaintiff has a personal interest; and therefore a *mandamus* will not lie to compel the performance of a mere personal contract (*Benson* v. *Paul*, 6 E. & B. 273); but it has been held to lie at the suit of the administrator of a deceased shareholder in a company incorporated by royal charter, to compel registration of his title (*Norris* v. *Irish Land Company*, 8 E. & B. 512, where *Benson* v. *Paul* is somewhat explained); also at the suit of a shareholder in a joint stock company against the company to compel them to restore his name on the register, the company having allowed a transfer of his shares by a forged transfer deed (*Swan* v. *North British Australasian Company*, 7 H. & N. 603; L. J. 31, Ex. 425; and in Ex. Ch., 2 H. & C. 175; L. J. 32, Ex. 273).

A claim for a *mandamus* has been sustained under this section, at the suit of an architect, employed by improvement commissioners, to compel the levying a rate to defray the amount of his charges, collaterally ascertained in the same suit by the verdict of a jury (*Ward* v. *Lowndes*, 1 E. & E. 940; L. J. 28, Q. B. 265, and affirmed in error, 1 E. & E. 956; L. J. 29, Q. B. 40; see also *Worthington* v. *Hulton*, L. R. 1 Q. B. 63; L. J. 35, Q. B. 61, and cases therein cited; also by a landowner who has had notice from a railway company that they require to take his land, under

the compulsory clauses of the Lands Clauses Act, 1845, to compel the company to issue their warrant to the sheriff to summon a jury to assess the value of the land (*Fotherby* v. *Metrop. Railway Company*, L. R. 2 C. P. 188).

The action may be maintained even though no actual damage has been sustained (*Id.*)

But the courts will use their discretion as to allowing the writ to go, even though the plaintiff has a good cause of action in respect of the plaintiff's breach of duty (*Nicholl* v. *Allen*, 1 B. & S. 916; and in Ex. Ch., 1 B. & S. 934; L. J. 31, Q. B. 283).

An action of *mandamus* under this act, like the prerogative writ of mandamus, is not applicable where there is any other remedy at law. Thus it is not maintainable against the clerk to commissioners under a local act, for work, &c., done for them, where it is not alleged, and it does not appear, that they became indebted as such commissioners, or became otherwise than personally indebted; or that the work, &c., was in execution of the local act, or that they would have power to levy rates for payment, or that there is any charge on the rates. And even if such an action is maintainable in such a case, it is barred by the Statute of Limitations, when six years have elapsed since they became indebted (*Bush* v. *Beavan*, 1 H. & C. 500; L. J., 32 Ex. 54).

Companies Act, 1862, s. 35.

Under section 35 of the Companies Act, 1862 (25 & 26 Vict. c. 89), a person who is aggrieved by his name being, without sufficient cause, omitted from, or inserted in the register of a company under that act, may avoid the delay and expense of a mandamus, by a summary application under that section to either of the superior courts of law or equity, or to a judge in chambers, and the court may thereupon order the rectification of the register; the section gives power to the court (if one of common law) if they think proper, to direct an issue to be tried in which any question of law may be raised and error or an appeal, in the manner directed by the C. L. P. A. 1854 (*ante*, p. 240), may be brought thereon. The Companies Act, 1867 (30 & 31 Vict. c. 131) s. 26, enacts that the transferor of shares may, under the above section, apply to have the name of the transferee entered on the register in like manner as if the application was made by the transferee. On the construction of the above sections, see *Ward and Henry's Case* (L. R. 2 Ch. 431).

Companies Act, 1867, s. 26.

Declaration in action for mandamus.

69. The declaration in such action shall set forth sufficient grounds upon which such claim is founded, and shall set forth that the plaintiff is personally interested therein, and that he sustains or may sustain damage by the non-performance of such duty, and that performance thereof has been demanded by him, and refused or neglected.

The specific amount of a debt sought to be recovered by *mandamus* need not be ascertained upon the declaration (*Ward* v. *Lowndes*, 1 E. & E. 940, 956).

Proceedings upon claim for mandamus.

70. The pleadings and other proceedings in any action in which a writ of mandamus is claimed shall be the same in all respects, as nearly as may be, and costs

shall be recoverable by either party, as in an ordinary action for the recovery of damages.

As to the applicability of the Statute of Limitations by way of plea, see *Ward* v. *Lowndes* (1 E. & E. 940, 956); and *Bush* v. *Beavan* (1 H. & C. 500).

As to costs, see C. L. P. A. 1860, s. 32, *post*.

Judgment and execution.

71. In case judgment shall be given to the plaintiff that a mandamus do issue, it shall be lawful for the court in which such judgment is given, if it shall see fit, besides issuing execution in the ordinary way for the costs and damages, also to issue a peremptory writ of mandamus to the defendant, commanding him forthwith to perform the duty to be enforced.

See for forms of judgment, R. G., M. V. 1854, sched. 32, *post*.

Form of peremptory writ.

72. The writ need not recite the declaration or other proceedings, or the matter therein stated, but shall simply command the performance of the duty, and in other respects shall be in the form of an ordinary writ of execution, except that it shall be directed to the party and not to the sheriff, and may be issued in term or vacation, and returnable forthwith; and no return thereto, except that of compliance, shall be allowed, but time to return it may, upon sufficient grounds, be allowed by the court or a judge, either with or without terms.

See as to costs, C. L. P. A. 1860, s. 32, *post*.

Effect of writ of mandamus, and proceedings to enforce it.

73. The writ of mandamus so issued as aforesaid shall have the same force and effect as a peremptory writ of mandamus issued out of the Court of Queen's Bench, and, in case of disobedience, may be enforced by attachment.

See C. L. P. A. 1860, s. 33, *post*.

The court may order the act to be done at the expense of the defendant.

74. The court may, upon application by the plaintiff, besides or instead of proceeding against the disobedient party by attachment, direct that the act required to be done may be done by the plaintiff, or some other person appointed by the court, at the expense of the defendant; and upon the act being done, the amount of such expense may be ascertained by the court, either by writ of inquiry or reference to a master, as the court or a judge may order; and the court may order payment of the amount of such expenses and costs, and enforce payment thereof by execution.

See for form of writ of inquiry, R. G., M. V. 1854, sched. 33, *post*.

Prerogative Mandamus.

Prerogative writ of mandamus preserved.

75. Nothing herein contained shall take away the jurisdiction of the Court of Queen's Bench to grant writs of mandamus; nor shall any writ of mandamus issued out of that court be invalid by reason of the right of the prosecutor to proceed by action for mandamus under this act.

See, as to prerogative *mandamus*, Corner's Crown Prac.; and Tapping on Mandamus.

Proceedings for prerogative writ of mandamus accelerated.

76. Upon application by motion for any writ of mandamus in the Court of Queen's Bench, the rule may in all cases be absolute in the first instance, if the court shall think fit; and the writ may bear teste on the day of its issuing, and may be made returnable forthwith, whether in term or in vacation, but time may be allowed to return it, by the court or a judge, either with or without terms.

Proceedings on prerogative writ of mandamus.

77. The provisions of "The Common Law Procedure Act, 1852," and of this act, so far as they are applicable, shall apply to the pleadings and proceedings upon a prerogative writ of mandamus issued by the Court of Queen's Bench.

This section removed the doubt which had arisen, whether the enactments as to pleading of the C. L. P. A. 1852, *ante*, applied to proceedings in MANDAMUS (*Reg.* v. *Saddlers' Company*, cited *ante*, p. 55).

Specific Delivery of Chattels.

Specific delivery of chattels.

78. The court or a judge shall have power, if they or he see fit so to do, upon the application of the plaintiff in any action for the detention of any chattel, to order that execution shall issue for the return of the chattel detained, without giving the defendant the option of retaining such chattel upon paying the value assessed, and that if the said chattel cannot be found, and unless the court or a judge should otherwise order, the sheriff shall distrain the defendant by all his lands and chattels in the said sheriff's bailiwick, till the defendant render such chattel, or, at the option of the plaintiff, that he cause to be made of the defendant's goods the assessed value of such chattel: provided that the plaintiff shall, either by the same or a separate writ of execution, be entitled to have made of the

defendant's goods, the damages, costs and interests in such action.

Courts of equity have, from a very early period, compelled the return of specific chattels. This jurisdiction seems formerly to have been confined in its exercise to cases where the chattels were of peculiar value to the owner, as, for instance, heir-looms, jewellery, articles of curiosity or antiquity, family pictures (*Pusey* v. *Pusey*, 1 Vern. 273; *Duke of Somerset* v. *Cookson*, 3 P. Wms. 389; *Saville* v. *Tancred*, 1 Ves. 101; *Fells* v. *Read*, 3 Ves. 71), or title deeds (*Brown* v. *Brown*, 1 Dick. 62; *Papillion* v. *Voice*, 2 P. Wms. 478; *Ford* v. *Peering*, 1 Ves. 72; *Duncombe* v. *Mayer*, 8 Ves. 320; *Jackson* v. *Butler*, 2 Atk. 306); or the certificate of the registry of a ship (*Gibson* v. *Ingo*, 6 Hare, 125). More recently it has been laid down that the right to be protected in the use or beneficial enjoyment of property *in specie*, is not confined to articles possessing any peculiar or intrinsic value, if there be any fiduciary relation between the parties (*Wood* v. *Rowcliffe*, 3 Hare, 304; and see *Livingston* v. *Simpson*, 1 S. & S. 600).

The Court of Chancery interferes in cases of detention of chattels, because in the action of *trover*, damages only were recovered; while in *detinue*, the defendant had it formerly in his power, if he chose, to retain the article upon payment of the value as assessed by the jury. The damages recovered in either action, although equal to the intrinsic value of the article detained, might be wholly incommensurate with that placed upon it by the owner, so that damages might not be anything like adequate compensation to him for the loss. "The Pusey Horn, the Patera of the Duke of Somerset" (observes Lord Loughborough), "were things of that sort of value that a jury might not give twopence beyond their weight." * * In all cases where the object of the suit is not susceptible of compensation by damages, it would be strange if the law of this country did not afford any remedy. It would be a great injustice if an individual cannot have his property, without being liable to have only the value at which it is estimated by people who have not his feelings upon it (*Fells* v. *Read*, 3 Ves. 71).

But where a money value *ad hoc* has been put upon the chattel by the plaintiff, the court will not enforce a specific delivery (*Dowling* v. *Betjemann*, 2 Johns. & H. 544).

The Courts of Common Law have now, under this section, after judgment in an action of *detinue*, the same jurisdiction to compel the return of a chattel as the Court of Chancery, but the latter Court may enforce its decrees by attachment, while the Courts of Common Law can only enforce restitution, under this section, by *distringas*.

The assessment of the value of the chattel detained is, by the terms of this section, a condition precedent to the exercise of the jurisdiction conferred upon the court; and therefore, where at the trial of an action of detinue for a lease, deposited as security for 150*l.*, the parties agreed that the jury should be discharged from finding the value of the lease, and the judge made an order on the defendant to deliver up the lease, the court rescinded that order; and *quære* whether, if the value had been assessed, the court could have ordered the lease to be delivered up, *on payment* of the 150*l.* (*Chilton* v. *Carrington*, 15 C. B. 730; L. J. 24, C. P. 78).

Money may now, *by leave of the court or a judge*, be paid into

court in *detinue* (C. L. P. A. 1860, s. 25, *post*); such leave will probably not be granted where the plaintiff seeks a specific restitution under this section, and the defendant is not absolutely unable to make it.

See also, as to the specific delivery of goods sold, "The Mercantile Law Amendment Act, 1856," s. 2, *post*.

See forms of writs of execution, R. G., M. V. 1854, scheds. 34, 35.

INJUNCTION.

Claim of writ of injunction.

79. In all cases of breach of contract or other injury, where the party injured is entitled to maintain and has brought an action, he may, in like case and manner as hereinbefore provided with respect to *mandamus*, claim a writ of injunction against the repetition or continuance of such breach of contract or other injury, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right; and he may also in the same action include a claim for damages or other redress.

In order to entitle a party to claim a writ of injunction under this section, three circumstances must combine:—

1. There must be a breach of contract or other injury.

2. It must be such a breach or injury as entitles the party injured to maintain an action.

3. Such action must have been commenced.

It would be to enter upon too wide a field, to discuss the various cases in which the writ of injunction may be claimed. Its use, however, will be found chiefly in the following classes of cases: actions by reversioners for waste, such as cutting timber; actions for breaches of covenant, including, of course, the various claims on farming and other leases; actions for infringement of prescriptive rights and easements, as ways, common, water, watercourses, and lights; actions for nuisances of various kinds; and actions for infringement of letters patent and copyrights. See *Mayall* v. *Higbey* (1 H. & C. 148; L. J. 31, Ex. 329), where the defendant was restrained from continuing to make and sell reduced copies of photographs.

A positive act, such as the pulling down a wall that obstructs light, may well be within the scope of an injunction (*Jessel* v. *Chaplin*, 2 Jur., N. S. 931, Ex. T. T. 1856; and see *Lumley* v. *Wagner*, 1 De G. M. & G. 601; L. J. 21, Ch. 898).

The granting of an injunction is not of right, upon mere proof of the invasion of a legal right; but the circumstances of the case will be taken into consideration (*Jessel* v. *Chaplin*, *ubi supra*); for example, in a case where an injunction was sought for the removal of a wall erected in breach of a covenant in a lease, and it appeared that the wall was erected by an under tenant, and that the injunction if granted could not be obeyed, the writ was refused (*L. & S. W. Railway Company* v. *Webb*, 15 C. B., N. S. 450); where a carrier had, in a previous action, recovered against a railway company, under the equality clauses in their

act, the excess of charges paid by him on packed parcels sent by their line, the Court of Exchequer refused to grant an injunction to restrain the company from continuing to impose excessive charges on like parcels (*Sutton* v. *S. E. Railway Company*, L. R. 1 Ex. 32); and where a plaintiff sought at once liquidated damages for breach of contract, as well as an injunction, the latter was refused (*Carnes* v. *Nisbett*, 7 H. & N. 778; L. J. 30, Ex. 348).

Upon motion and affidavit of a plaintiff, stating that, unless the Court granted the writ of injunction prayed for, he would sustain considerable loss before the action could be tried, the Court of Queen's Bench in Ireland granted the writ, upon the terms that the plaintiff would speed the action; and, if the jury found for the defendant, would, if the Court so ordered, pay to the defendant any sum which the jury should award to him as compensation for the damages sustained by reason of the interference of the Court in granting the writ (*Longfield* v. *Cashman*, 11 Ir. Com. Law Rep., App. xxiii., Q. B.).

As to costs, see C. L. P. A. 1860, s. 32, *post*.

As to enforcing an injunction against a corporation, see C. L. P. A. 1860, s. 33, *post*.

Patent Law Amendment Act, 1852.

In respect of patents, the "Patent Law Amendment Act, 1852" (15 & 16 Vict. c. 83, s. 42), has provided that "in any action in any of her majesty's superior courts of record at Westminster * * * for the infringement of letters patent, it shall be lawful for the court in which such action is pending, if the court be then sitting, or if the court be not sitting, then for a judge of such court, on the application of the plaintiff or defendant respectively, to make such order for an injunction, inspection, or account, and to give such direction respecting such action, injunction, inspection and account, and the proceedings therein respectively, as to such court or judge may seem fit." (See hereon *Holland* v. *Fox*, 3 E. & B. 977; L. J. 23, Q. B. 211; and *Vidi* v. *Smith*, 3 E. & B. 769; L. J. 23, Q. B. 342; *Elwood* v. *Christy*, 18 C. B., N. S. 494; L. J. 34, C. P. 250).

See the practice in Chancery in patent cases, explained in *Price's Candle Company* v. *Bauwen's Company* (4 Kay & J. 727). See s. 82, n. (*post*, p. 277).

As to the jurisdiction of the Court of Common Pleas, under "The Railway and Canal Traffic Act, 1854" (17 & 18 Vict. c. 31, s. 3), to grant injunctions to restrain breaches of the provisions of that act, see cases cited in Chitty's Statutes, 3rd ed., vol. ii., p. 68.

Form of writ of summons and indorsement thereon.

80. The writ of summons in such action shall be in the same form as the writ of summons in any personal action; but on every such writ and copy thereof there shall be indorsed a notice that in default of appearance the plaintiff may, besides proceeding to judgment and execution for damages and costs, apply for and obtain a writ of injunction.

For form of indorsement on writ of summons of claim of injunction, see R. G. M. V. 1854, sched 36, *post*.

Form of pro-

81. The proceedings in such action shall be the

same, as nearly as may be, and subject to the like control, as the proceedings in an action to obtain a mandamus under the provisions hereinbefore contained; and in such action judgment may be given that the writ of injunction do or do not issue, as justice may require; and in case of disobedience, such writ of injunction may be enforced by attachment by the court, or, when such courts shall not be sitting, by a judge. ceedings and of judgment.

A demurrer will not be allowed to the claim of a writ of injunction in a declaration, unless the declaration clearly shows that the remedy is inapplicable (*Bilke* v. *L. Chatham and Dover Railway Company*, 3 H. & C. 95; L. J. 33, Ex. 306). Nor can the claim be pleaded to (*Booth* v. *Taylor*, L. R. 1 Ex. 51).

82. It shall be lawful for the plaintiff at any time after the commencement of the action, and whether before or after judgment, to apply *ex parte* to the court or a judge for a writ of injunction to restrain the defendant in such action from the repetition or continuance of the wrongful act or breach of contract complained of, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right; and such writ may be granted or denied by the court or judge upon such terms as to the duration of the writ, keeping an account, giving security, or otherwise, as to such court or judge shall seem reasonable and just, and in case of disobedience, such writ may be enforced by attachment by the court, or, when such courts shall not be sitting, by a judge: provided always, that any order for a writ of injunction made by a judge, or any writ issued by virtue thereof, may be discharged or varied or set aside by the court, on application made thereto by any party dissatisfied with such order. Writ of injunction may be applied for at any stage of the cause.

In an action for infringing a patent, the court will under this section grant only a rule nisi in the first instance for an injunction against the defendant; and on cause being shown it will give such directions as would be given by a court of equity (*Gittens* v. *Symes*, 15 C. P. 362; L. J. 24, C. P. 48).

When a writ of injunction has been granted it continues to exist till it is discharged, and the plaintiff may at any time apply for an attachment in case of disobedience (*De la Rue* v. *Fortescue*, 2 H. & N. 324; L. J. 26, Ex. 339).

This section does not apply to an action of ejectment (*Baylis* v. *Le Gros*, 2 C. B., N. S. 316; L. J. 26, C. P. 176).

As to costs see *De la Rue* v. *Fortescue* (*ubi supra*).

Equitable Defences.

Equitable defence may be pleaded.

83. It shall be lawful for the defendant or plaintiff in replevin in any cause in any of the Superior Courts in which, if judgment were obtained, he would be entitled to relief against such judgment on equitable grounds, to plead the facts which entitle him to such relief by way of defence, and the said courts are hereby empowered to receive such defence by way of plea; provided that such plea shall begin with the words "for defence on equitable grounds," or words to the like effect.

General rule. In the application under this enactment of equitable principles by the courts of law, the following general rule has been laid down and steadily adhered to:—that a plea can only be supported at law on equitable grounds where an absolute and unconditional injunction would be granted in equity; so that, where the plea is followed by a common law judgment, complete and final justice may be done between the parties (*Mines Royal* v. *Magnay*, 10 Exch. 489; *Phelps* v. *Prothero*, 16 C. B. 370; L. J. 24, C. P. 225; *Wodehouse* v. *Farebrother*, 5 E. & B. 277; *Wood* v. *Copper Miners Company*, 17 C. B. 561; *Clark* v. *Laurie*, L. J. 26, Ex. 38; *Gee* v. *Smart*, 8 E. & B. 313; *Drain* v. *Harvey*, 17 C. B. 257; *Flight* v. *Gray*, 3 C. B., N. S. 320; *Scott* v. *Littledale*, 8 E. & B. 815; L. J. 27, Q. B. 201; *Hyde* v. *Graham*, 1 H. & C. 593; *Wakley* v. *Froggatt*, 2 H. & C. 669; L. J. 33, Ex. 5); but the courts will not disallow a plea where the question, as to whether it discloses a right to such an injunction is reasonably arguable, but they will allow it to be determined on demurrer (*Elliott* v. *Mason*, L. J. 26, Ex. 175). If the plea be pleaded in such a form that it is calculated to embarrass the plaintiff he may apply, under C. L. P. A. 1852, s. 52 (*ante*, p. 52), to have it struck out or amended.

It is of course impossible to comprise within a small compass the various cases in which courts of equity administer relief; but some examples may be given by way of illustration:—

Accident. One head under which courts of equity have constantly given relief has been that of "*accident.*" At law, an executor, having once received assets of his testator, cannot discharge himself under a plea of *plene administravit*, against a creditor seeking satisfaction out of the testator's assets, either on the score of inevitable accident, as destruction by fire, loss by robbery, or the like, or reasonable confidence disappointed, or loss by any of the various means which afford excuse to ordinary agents and bailees, in cases of loss without any negligence on their part (*per* Lord Ellenborough, *Crosse* v. *Smith*, 7 East, 258) Thus in a case where an executor having received assets, and paid them over to a co-executor for the purpose of satisfying a bond creditor, who had demanded payment from such co-executor, upon the latter applying it in payment of his own simple contract debts, it was held that the executor, who had paid him the money, could not discharge himself by the plea of *plene administravit* to an action by the bond creditor. In equity, however, although an executor is liable, should he *unnecessarily* pay over assets to his co-

executor, whereby they are embezzled or lost (*Townsend* v. *Barker*, 1 Dick. 356; *Langford* v. *Gascoigne*, 11 Ves. 333), yet if the payment were in discharge of a necessary duty, as for the purpose of satisfying creditors residing at a distance from the executor remitting such assets, he would not be liable for their loss (*Bacon* v. *Bacon*, 5 Ves. 331; Tudor's Leading Cases in Equity, 2nd ed, vol. ii. pp. 760—763). Again, in equity, an executor has been held not liable for the loss of assets occasioned by fire (*Lady Croft* v. *Lyndsey*, Freem. Ch. Rep. 1), or robbery (*Holt* v. *Holt*, 1 Ch. Ca. 191; *Jones* v. *Lewis*, 2 Ves. 240). In these cases an executor might have proceedings against him at law restrained; he may now plead in bar of an action the same circumstances, which would have entitled him to this relief in equity. On the other hand, the plaintiff may, by way of replication, insist upon any of those circumstances, which in equity would have rendered the executor liable, as, for instance, that a transfer of assets to a co-executor was unnecessarily made.

Mistake.

The courts of equity also give relief against *mistakes*. Although relief will not be afforded against the legal consequences of anything done in ignorance of the *law* (*Marshall* v. *Collett*, 1 Y. & C. Ex. 238; *Great Western Railway Company* v. *Cripps*, 5 Hare, 91; Drew. on Injunct. 62); a court of equity will frequently give relief against the legal consequences of mistakes of *fact*. Where, for instance, a person executed a deed, in which he, by mistake, covenanted to pay a sum of money to another, who commenced an action against him, a court of equity granted an injunction to restrain the action (*Ball* v. *Storie*, 1 S. & S. 210, see also Drew. on Injunct. 62); so an equitable replication to a plea of release that the claim was included in the release by mistake, is good (*Lyall* v. *Edwards*, 6 H. & N. 337; L. J. 31, Ex. 193).

But mistake in respect of a written contract, can rarely be brought within the general rule laid down above; as the contract would in equity have to be reformed (*Perez* v. *Oleaga*, 11 Exch. 506; *Teede* v. *Johnson*, 11 Exch. 840; L. J. 25, Ex. 110; *Drain* v. *Harvey*, *Scott* v. *Littledale*, 8 E. & B. 815; *Solvency Mutual Guarantie Company* v. *Freeman*, 7 H. & N. 17; L. J. 31, Ex. 197). But where there is no occasion to reform the contract, as where an agent is wrongly described as principal (*Wake* v. *Harrop*, 6 H. & N. 768; L. J. 30, Ex. 273; and *in error*, 1 H. & C. 202; L. J. 31, Ex. 451); or where it has been completely executed according to the intention of the parties (*Steele* v. *Haddock*, 10 Exch. 643; *Luce* v. *Izod*, 1 H. & N. 245; *Vorley* v. *Barrett*, 1 C. B., N. S. 225); or where the full performance has become impracticable by reason of the default of the plaintiff, mistake may furnish ground for equitable answer at law (*Borrowman* v. *Rossel*, 16 C. B., N. S. 58; L. J. 33, C. P. 111). And upon this ground, *Wood* v. *Dwarris* (11 Exch. 493, disapproved of in *Wheelton* v. *Hardisty*, 8 E. & B. 232; L. J. 26, Q. B. 265), may possibly be supported. See also *Lawrence* v. *Walmsley* (12 C. B., N. S. 799; L. J. 31, C. P. 143), where to a declaration on a promissory note the defendant pleaded, as an equitable plea, that he made the note jointly with E., for the accommodation of E., and as his surety; that at the time of making the note, the plaintiff, having notice of the premises, agreed, in consideration of the defendant's making the said note as surety, to call in and demand payment of the said note from E. within three years; that a memorandum of the agreement was to be indorsed upon the note, which, by

mistake, was not done; that the plaintiff did not demand payment of E. within three years, whereby he lost the means of obtaining payment from E., who had since become insolvent: it was held, on demurrer, that the plea was good, on the ground that the plaintiff had not performed the condition in consideration of which the defendant became surety. As to an equitable plea stating that a written contract binding the defendants personally at law, was entered into by him as agent only, and on the understanding that he should not be personally liable, see *Burgoyne* v. *Cotterell* (L. J. 24, Q. B. 28); and *Courtauld* v. *Saunders* (16 L. T., N. S. 562, C. P. T. T. 1867).

Fraud. Another very important head under which equity gives relief is that of *fraud*, both actual and constructive. There are many cases where a court of law does not take cognizance of what is considered fraud in a court of equity. Where, for instance, the owner of an estate stands by and permits another person to expend money upon it, in ignorance of the owner's title, a court of equity will not allow him to proceed to take advantage of his legal right, by ejecting, without compensation, the person who has made such expenditure (*Hunning* v. *Ferrers*, Gilb. Eq. Rep. 456; *Stiles* v. *Cowper*, 3 Atk. 83; *Earl of Oxford's Case*, 1 Ch. Rep. 1; Tudor's L. C. in Eq. 2nd. ed. vol. ii. p. 504, and note, p. 518). Where, in an action for obstructing lights, the defendant pleaded, by way of equitable plea, that the obstruction was caused by repairs and alterations made by the defendant upon his own premises with the assent of the plaintiff, a replication that that assent of the plaintiff was procured by the false representations of the defendant, was held a good equitable answer to a good equitable plea (*Davies* v. *Marshall*, 10 C. B., N. S. 697; L. J. 31, C. P. 61).

The effect of fraud is necessarily the same at law as in equity (*Cornish* v. *Abington*, 4 H. & N. 549; L. J. 28, Ex. 262).

Again, when a party has conveyed a reversionary or expectant interest for an inadequate value, he may set aside the transaction in a court of equity, if he can show that undue advantage has been taken of his position (*Gowland* v. *De Faria*, 17 Ves. 20; *Bawtree* v. *Watson*, 3 My. & K. 339; *Edwards* v. *Browne*, 2 Coll. 100; *Davies* v. *Cooper*, 5 My. & Cr. 270).

In these cases, in equity, the *onus* of proving the adequacy of the price lies upon the person dealing with the reversioner (*Gowland* v. *De Faria*, *ubi supra*). *Quære*, whether it will be so at law? Where, however, the dealing with a reversionary interest is in the nature of a family arrangement (*Tweddell* v. *Tweddell*, J. & R. 13; *Heron* v. *Heron*, 2 Atk. 160; *Wallace* v. *Wallace*, 2 D. & W. 452), or where the person having a prior interest joins in the sale (*Wood* v. *Abny*, 3 Madd. 422; *Wardle* v. *Carter*, 7 Sim. 490), and, according to Lord Brougham, where the transaction was known to the father of the reversioner, or the person from whom the *spes successionis* was entertained (*King* v. *Hamlet*, 2 My. & K. 456), or if the transaction had been so acted upon as to alter the situation of the other party in his property (*Ib. sed vide* Sug. V. & P. 316, 11th ed.), a court of equity will not afford relief; and where a sale of reversionary or expectant interest has taken place by *auction*, the purchaser is presumed to have given an adequate price for it (*Shelly* v. *Nash*, 3 Madd. 232), unless it appears that by the conditions of sale, or mode of conducting it,

the interests of the reversioner were not properly attended to (*Fox* v. *Wright*, 6 Madd. 111).

Where an expectant or reversioner borrows money upon a post-obit bond, a court of equity will set it aside if unreasonable, or if the price be inadequate (*Curwyn* v. *Milner*, 3 P. Wms. 293, n.; *Peacock* v. *Evans*, 16 Ves. 512; and see White & Tudor's L. C. in Eq., 2nd ed. vol. i. p. 480).

Upon the same principle equity gives relief, against proceedings at law, upon instruments obtained by *undue influence*, from persons standing in some fiduciary relation to the holder, as that of trustee and *cestui que trust*, guardian and ward, or any other relation in which dominion may be exercised by one person over another (*Huguenin* v. *Basely*, Tudor's L. C. in Eq., 2nd ed. vol. ii. p. 462, and note; *Cooke* v. *Lamotte*, 15 Beav. 234; *Espe* v. *Lake*, 10 Hare, 260; and see *Kay* v. *Smith*, 21 Beav. 522).

Misrepresentation of value, unless fraudulent, is not ground of defence, either at law or in equity, to an action upon a contract (*Gorsuch* v. *Cree*, 8 C. B., N. S. 574; L. J. 29, C. P. 308). To a declaration on a bill against acceptor, the court refused to allow him to plead, as an equitable defence, that the bill was accepted upon a distinct promise by the plaintiff, that if the defendant would pay certain discount, the plaintiff would renew, from time to time, until the defendant was of ability to meet the bill; that the defendent had always kept his part of the contract, but that the plaintiff had refused to renew upon the defendant's application to him to do so; and that he had never been of ability to pay the bill (*Flight* v. *Gray*, 3 C. B. N. S. 320). To a *sci. fa.* against a shareholder in a railway company, an equitable plea that the defendant became the transferee of the shares upon the representation of the plaintiff that he should incur no responsibility, and that he had never derived any benefit from the shares, was held bad (*Bill* v. *Richards*, 2 H. & N. 311; L. J. 26 Ex. 409).

Forfeiture.

Relief against *forfeitures* of estate is also given in certain cases in equity; see Smith's Manual of Equity Jurisprudence, and 22 & 23 Vict. c. 35 (*post*, pp. 295, 296). Thus where a lessee covenants to do or not to do certain acts, with a clause of re-entry for breach of the covenant, and then commits such breach, equity will, under some circumstances, relieve against the strict legal consequences of the breach of the obligation by the party bound. So, in some cases, when the thing to be done, the not doing of which has worked the forfeiture at law, can be specifically done, so as to put the party *bonâ fide* and entirely *in statu quo*,—or the injury can be compensated by a sum certain, or by damages capable of being estimated by some certain rule of the court,—then equity will relieve (Drewry on Injunctions, p. 88); but such cases do not fall within the above-mentioned general rule; and therefore, and also because equitable defences are not pleadable in ejectment (*Neave* v. *Avery*, 16 C. B. 328. L. J. 24, C. P. 207), recourse can only be had, in cases of forfeiture for non-payment of rent, to the provisions of the C. L. P. A. 1852, ss. 210—212 (*ante*, pp. 161—166); and in such cases, and also in cases of forfeiture through breach of covenant to insure, to the C. L. P. A. 1860, s. 1, *et seq.*, *post*.

Principal and surety.

With regard to the relation of *principal and surety*, courts of equity frequently give relief against proceedings at law. Where, for instance, parties appear on the face of an instrument to be all liable as principals, yet if one of them in fact joined only as

surety, he may plead that he was only a surety; and thus have the benefit of time having been given to the principal debtor, or of any other discharge of the sureties (*Claythorne* v. *Swinburne*, 4 Ves. 160, 170; *Clinton* v. *Hooper*, 1 Ves. jun. 173; 3 Bro. C. C. 201; and now at law, see *Pooley* v. *Harradine*, 7 E. & B. 431; *Elliot* v. *Mason*, L. J. 26 Ex. 175; *Strong* v. *Foster*, 17 C. B. 201; *Gordon* v. *Rae*, 8 E. & B. 1605, and *Taylor* v. *Burgess*. 5 H. & N. 1; and see *Watts* v. *Shuttleworth*, 5 H. & N. 235; L. J. 29, Ex. 229; and in error, 7 H. & N. 353; *Rayner* v. *Tussey*, L. J. 28, Ex. 132; *Greenough* v. *M'Clelland*, 2 E. & E. 424, and in Exch. L. J. 30, Q. B. 15). In a recent case, Lord Romilly, M. R., refused relief to a surety, against whom judgment had been recovered at law, on the ground that "the doctrines relating to principal and surety are the same at law and in equity," and the surety had already failed at law (*Cooper* v. *Evans*, L. R. 4 Eq. 45).

Merely equitable interests. The courts of law have no power of interference in those cases, where a person has a merely *equitable interest*. Where, for instance, a tenant has contracted to purchase from his landlord the property of which he is in the occupation, if the landlord takes proceedings in ejectment, the tenant must still resort to the Court of Chancery for his injunction to stay proceedings; and see note to section 85 (*post*, p. 284).

Set-off. Pleas of set-off, upon equitable grounds, are not allowed unless sustainable as in avoidance of circuity of action; *i. e.*, when the damages recoverable on either side arise out of the same matter, and are necessarily equal (*Stimson* v. *Hall*, 1 H. & N. 831; *Atterbury* v. *Jarvie*, 2 H. & N. 114; *Minshull* v. *Oakes*, 2 H. & N. 793; L. J. 27 Ex. 194; *Jackson* v. *Isaacs*, 3 H. & N. 405); but see an instance of equitable set-off in *Marcon* v. *Bloxam* (11 Exch. 586), where a plea of adequate *realized* security in the hands of the plaintiff, was allowed. And a debt due to a third person, as a trustee thereof for the defendant, may well be set-off (*Cockrane* v. *Green*, 9 C. B. N. S. 448; L. J. 30, C. P. 97).

A defendant may also set off, by way of equitable defence, money due to him under an equitable assignment by a third person, in respect of equities subsisting between the plaintiff, and the defendant, and that third person (*Elkin* v. *Baker*, 6 C. B. N. S. 526; L. J. 31, C. P. 177).

An equitable plea to an action for a debt that the plaintiff had before suit assigned the debt for good considerations, and that the assignee had given the defendant notice thereof, and required him to pay the money to the assignee is good (*Jeffs* v. *Day*, L. R. 1 Q. B. 372). As to an equitable replication, on similar grounds, to a plea of set-off, see s. 85, note, and cases there cited (*post*, p. 284).

As to the principles followed in courts of equity in allowing a set-off, see *Freeman* v. *Lomas* (9 Hare, 109; L. J. 20 Ch. 564) and *In re Commercial Bank Corporation, &c.* (L. R. 1 Ch. 538).

Exoneration. To a declaration upon a covenant to pay money, an equitable plea of exoneration through the plaintiff's having inherited the estate of the defendant's deceased wife (which was the primary fund charged with the debt) was allowed (*Gee* v. *Smart*, 8 E. & B. 313).

To an action for a debt. a plea that the plaintiff had proved the debt under the defendant's bankruptcy then pending, was

held to be no answer upon equitable grounds (*Spencer* v. *Dennett*, L. R. 1 Ex. 123).

Destruction of premises by fire, is no equitable defence to an action for rent (*Lafft* v. *Dennis*, 1 E. & E. 474; L. J. 28, Q. B. 168). See further the cases cited (p. 278, *supra*).

All the cases in equity are collected in Drewry on Injunctions.

A judgment in equity is not necessarily a defence at law (*Phelps* v. *Prothero*, 16 C. B. 370, L. J. 24, C. P. 225; *Collins* v. *Case*, L. J. 27, Ex. 146; and see *Pearse* v. *Robins*, L. J. 26, Ex. 183). Where a defendant at law has filed a bill for relief in equity, he is not allowed to plead at law an equitable defence upon the same grounds (*Schlumberger* v. *Lister*, 2 E. & E. 855; L. J. 29, Q. B. 157); and it has been held, in Chancery, that a defendant at law, who has elected to avail himself of an equitable defence there, cannot be allowed to file a bill in Chancery for an injunction upon the same grounds (*Terrell* v. *Higgs*, 1 De G. & J. 388; L. J. 26, Ch. 837; *Wild* v. *Hillas*, L. J. 28, Ch. 170; *Cooper* v. *Evans*, L. R. 4 Eq. 45; but see *Prothero* v. *Phelps*, 7 De G. M. & G. 722; L. J. 25, Ch. 105, LL. JJ.; and *Waterlow* v. *Bacon*, L. R. 2 Eq. 514); in the absence of an equitable defence *actually pleaded* at law, the Court of Chancery will not withhold its ancient protection (*Kingsford* v. *Swinford*, L. J. 28, Ch. 413; *Gowpertz* v. *Pooley*, 4 Drew. 448; L. J. 28, Ch. 484).

Leave is necessary to plead an equitable defence, together with other pleas, to the same cause of action (C. L. P. A. 1852, s. 86, *ante*, p. 82); but otherwise it may be pleaded without such leave (see *per* Channell, B., in *Atterbury* v. *Jervis*, L. J. 26, Ex. 182; and *contra per* Bramwell, B., in *Hunter* v. *Gibbons*, 2 H. & N. 459; L. J. 26, Ex. 4); a sole plea may however be struck out under C. L. P. A. 1852, s. 52 (*ante*, p. 52), or s. 86 (*post*, p. 284).

A defendant does not lose his defence at law by mistakingly entitling his plea "for defence on equitable grounds" (*Thorne* v. *Tilbury*, L. J. 27, Ex. 407, citing *Vorley* v. *Barrett*, *ubi supra*), and a plea so pleaded may be sustained as a plea at law if it discloses a good legal defence (*Hyde* v. *Graham*, 1 H. & C. 593): see also the observations of Bramwell, B., in *Wakley* v. *Froggatt* (2 H. & C. 669; L. J. 33, Ex. 5.)

Equitable defence after judgment.

84. Any such matter which, if it arose before or during the time for pleading, would be an answer to the action by way of plea, may, if it arise after the lapse of the period during which it could be pleaded, be set up by way of *auditâ querelâ*.

See as to *auditâ querelâ*, R. G. H. T. 1853, r. 79, *post*.

Equitable replication.

85. The plaintiff may reply, in answer to any plea of the defendant, facts which avoid such plea upon equitable grounds; provided that such replication shall begin with the words "for replication on equitable grounds," or words to the like effect.

An equitable plea makes the subsequent pleadings equitable, although they are not so pleaded, and the replication may be supported on any ground that shows an answer to the plea (*Selvin* v. *Holylake Railway Company*, L. R. 1 Ex. 9, *per* Channell, B.).

As a legal right must be alleged in the declaration, an equitable replication, if inconsistent with that legal right, would be a departure from it and a variance, and therefore bad upon general demurrer (*Gulliver* v. *Gulliver*, 1 H. & N. 174; *Hunter* v. *Gibbons*, 1 H. & N. 459; *Reis* v. *Scottish Equitable Company*, 2 H. & N. 19; *Schlumberger* v. *Lister*, 2 E. & E. 855); and so also where a plaintiff seeks to set up in his replication some equitable matter inconsistent with the declaration (*Thames Iron Works, &c. Company* v. *The Royal Mail Steam Ship Company*, 13 C. B., N. S. 358; L. J. 31, C. P. 169): and where, in reply to a plea of infancy, the plaintiff, in an action on contract, sought to set up fraudulent concealment or misrepresentation thereof, such replication was held bad, as a departure (*De Roo* v. *Foster*, 12 C. B., N. S. 272; *Bartlett* v. *Wells*, 1 B. & S. 836; L. J. 31, Q. B. 57), but an equitable replication is properly pleadable if it is consistent with the legal right alleged in the declaration, as where it shows that it is inequitable for the defendant to set up the legal defence which he has pleaded (*Lyall* v. *Edwards*, 6 H. & N. 337; L. J. 30, Ex. 193); or where it is confined to an equitable answer to an equitable plea, it is properly pleadable (*Sloper* v. *Cottrell*, L. J. 26, Q. B. 7; and see further *Wood* v. *Dwarris*, 11 Ex. 493; and *Vorley* v. *Barrett*, 1 C. B., N. S. 225); and, if an equitable replication is pleaded in protection of an equitable claim advanced under a legal title, against a defence available only as against such legal title, as in the case of an assignee of a chose in action suing in the name of the assignor, and met by such pleas as set-off against, or payment to, or release by, the assignor, the assignee may reply equitably that the defendant had prior notice of the assignment (see hereon *De Pothonier* v. *De Mattos*, E. B. & E. 461; L. J. 27, Q. B. 260; *Wilson* v. *Gabriel*, 4 B. & S. 243; *Watson* v. *Mid Wales R. Company*, L. R. 2 C. P. 593; and see *Rawstorn* v. *Gandell*, 15 M. & W. 304). In a case where to the common money counts the defendant pleaded that he had with the plaintiff's consent delivered a promissory note on account of the debt to C., who still held it, a replication on equitable grounds that C. at the time of the delivery had been and still was a trustee of the plaintiffs, who were alone beneficially interested in the note of which the defendant had notice, and that the note was overdue and unpaid, was held a good answer to the plea (*National Savings Bank Association* v. *Tranah*, L. R. 2 C. P. 556).

Fraudulent concealment of a cause of action cannot be equitably replied to the Statute of Limitations (*Imperial Gas Company* v. *London Gas Company*, 10 Exch. 39; *Hunter* v. *Gibbons*, 1 H. & N. 459).

See generally note to s. 83 (*ante*, pp. 278—283).

Court or judge may strike out equitable plea or replication.

86. Provided always, that in case it shall appear to the court, or any judge thereof, that any such equitable plea or equitable replication cannot be dealt with by any court of law so as to do justice between the parties, it shall be lawful for such court or judge to order the same to be struck out, on such terms as to costs and otherwise as to such court or judge may seem reasonable.

See C. L. P. A. 1852, s. 52, and note (*ante*, p. 52).
See also cases cited *ante*, p. 278.

ACTIONS ON LOST INSTRUMENTS.

87. In case of any action founded upon a bill of exchange or other negotiable instrument, it shall be lawful for the court or a judge to order that the loss of such instrument shall not be set up, provided an indemnity is given, to the satisfaction of the court or judge, or a master, against the claims of any other person upon such negotiable instrument. Actions on lost instruments.

The loss of a negotiable bill, given on account of a debt, is an answer to an action for the debt, as well as to one on the bill (*Crowe* v. *Clay*, 9 Exch. 604); *aliter*, if the bill or note is *not negotiable* (*Wain* v. *Bailey*, 10 A. & E. 606).

The defence can only be raised under a plea alleging the fact (*Charnley* v. *Grundy*, 14 C. B. 608). Such a plea may, therefore, now be struck out, on an indemnity being given

But though the holder of a lost bill was in such case without remedy at law, the Court of Chancery was in the habit of giving him relief, on his indemnifying the person liable on the bill against the claims of all other persons (*Terese* v. *Geray*, Finch, 301; *Walmsley* v. *Child*, 1 Ves. sen. 345). This, however, was only done in the case of foreign bills, and to extend the remedy to inland bills, the stat. 9 & 10 Will. 3, c. 17, s. 3 was passed (*Walmsley* v. *Child*, *ubi supra*), which enacted that "in case any such* inland bill or bills of exchange shall happen to be lost or miscarried within the time before limited for payment of the same, then the drawer of the said bill or bills is and shall be obliged to give another bill or bills of the same tenor with those first given, the person or persons to whom they are and shall be so delivered giving security, if demanded, to the said drawer, to indemnify him against all persons whatsoever, in case the said bill or bills of exchange so alledged to be lost or miscarried, shall be found again." 9 & 10 *Will.* 3 c. 17, s. 3.

To obtain the benefit of this statute, it was still necessary to proceed in equity, for it was held that the common law courts had no jurisdiction, because they were not able to enforce the giving of a new bill or qualified to judge of the sufficiency of an indemnity (*Davies* v. *Dodd* (in Equity), 4 Price, 176; *S. C.* (at Law), 4 Taunt. 176; *Ex parte Greenway*, 6 Ves. 812).

As to the jurisdiction exercised by the courts of equity in the case of lost instruments, see Byles on Bills, 8th ed. pp. 353, 354, and cases there cited.

This present section obviates the difficulty raised by the construction put on the former statute.

See *Conflans Stone Quarry Company* v. *Parker*, *P. O.* (16 W. R. 127, C. P. M. T. 1867).

88. *The Superior Courts, or any judge thereof, may, upon summary application by rule or order, exercise such and the like jurisdiction as may, under the provisions of an act of parliament made and passed in the fifty-third year of the reign of his* *Jurisdiction under Shipowners' Act.*

* "Such" includes all inland bills of exchange of the sum of 5*l.* and upwards, payable at a certain number of days after the date thereof (sect. 1).

Repealed by C. L. P. A. 1860, s. 35, post.

Majesty King George the Third, intituled "An Act to limit the Responsibility of Shipowners in certain Cases," *be exercised by any Court of Equity.*

"The Merchant Shipping Repeal Act, 1854," received the Royal Assent on the 11th August, 1854 (the day before this act); and it repealed, as from the time of its passing, the 53 Geo. 3, c. 159, upon which the above section was to operate!

This blunder has been corrected by the C. L. P. A. 1860, s. 35, *post.*

False evidence.

89. Any person who shall, upon any examination upon oath or affirmation, or in any affidavit in proceedings under this act, wilfully and corruptly give false evidence, or wilfully and corruptly swear or affirm anything which shall be false, being convicted thereof, shall be liable to the penalties of wilful and corrupt perjury.

Execution to fix bail.

90. Writs of execution to fix bail may be tested and returnable in vacation.*

This section supersedes R. G. H. T. 1853, r. 74, in so far as it relates to writs of *ca. sa.* to fix bail, being made returnable on a day certain *in term.* The writ must still be made returnable on a *day certain.* Proceedings to outlawry could not be founded on a *ca. sa.*, returnable "immediately after the execution thereof" (*Levy* v. *Hamer*, 5 Ex. 518), for an obvious reason, which equally applies to a writ of *ca. sa.* to fix bail.

This section leaves untouched R. G. H. T. 1853, r. 75, *post*, which requires that a writ of *capias ad satisfaciendum* to fix bail shall have eight days between the *teste* and return, and must, in London or Middlesex, be entered four clear days in the public book at the sheriff's office.

Scire Facias on Judgment of Assets in Futuro.

Scire facias on judgment of assets *in futuro.*

91. Proceedings against executors upon a judgment of assets *in futuro* may be had and taken in the manner provided by "The Common Law Procedure Act, 1852," as to writs of revivor.

This section seems supplementary to C. L. P. A. 1852, s. 132 (*ante* p. 114).

If, on a plea of *plene administravit*, the plaintiff takes judgment of assets *quando acciderint*, and assets afterwards come into the hands of the executor, the plaintiff must sue out a *scire facias* against the executor, before he can have execution (2 Wms. Saund. 219, n. (2); *Smith* v. *Tateham*, 2 Exch. 203).

If upon this writ of *sci. fa.*, assets are found for part, the plaintiff may have judgment to recover so much immediately, and the residue of the assets *in futuro* (1 Wms. Saund. 336 b). As to what must be stated in the writ of *sci. fa.* on a judgment of assets *in futuro*, see 2 Wms. Saund. 218 a.

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* This provision might have been usefully extended to writs of subpœna, which must be tested in *term.* It is not unusual for a writ of subpœna to be tested of a term preceding the date of the writ of summons.

See generally as to practice on writs of revivor, C. L. P. A. 1852, ss. 131—134, and notes (*ante*, pp. 113—115).

DEATH OF PARTIES.

To compel continuance or abandonment of action in case of death.

92. Where an action would, but for the provisions of "The Common Law Procedure Act, 1852," have abated by reason of the death of either party, and in which the proceedings may be revived and continued under that act, the defendant or person against whom the action may be so continued may apply by summons to compel the plaintiff, or person entitled to proceed with the action in the room of the plaintiff, to proceed according to the provisions of the said act within such time as the judge shall order; and in default of such proceeding, the defendant or other person against whom the action may be so continued as aforesaid shall be entitled to enter a suggestion of such default, and of the representative character of the person by or against whom the action may be proceeded with, as the case may be, and to have judgment for the costs of the action and suggestion against the plaintiff, or against the person entitled to proceed in his room, as the case may be, and in the latter case to be levied of the goods of the testator or intestate.

The C. L. P. A. 1852, contains several provisions with respect to the effect, upon the proceedings in an action, of the death, marriage, or bankruptcy of any of the parties. These enactments (which see *ante*, pp. 115—123), were all in favour of the *plaintiff*. This section enables *defendants*, in all cases of a change of parties by death or otherwise, to bring the proceedings to a close, by compelling the person entitled to go on with the action to proceed therewith, or have a judgment of *non pros.* signed against him.

The proceedings under this section are to be by summons at chambers.*

It may be that a defendant may adopt this course in the case of the death of the husband, in an action brought by a man and his wife, for an injury done to the wife, where the husband has added claims arising to him in his own right, under C. L. P. A. 1852, s. 40 (*ante*, p. 47). The surviving wife, in respect of claims which survive to her; the legal representative of the husband in respect of his rights of action; are the parties to be called upon to proceed with the action.

In case of the death of one or more of several plaintiffs, or of one or more of several defendants, the surviving plaintiffs, if the cause of action survives to them, are the parties to be called upon to enter a suggestion of the death (C. L. P. A. 1852, s. 136, *ante*, p. 116); and this, if the death happened *before* issue joined,

* See, as to the jurisdiction of a judge and of a master at chambers, C. L. P. A. 1860, s. 4, n. (*post*, pp. 297, 298).

But the court would not compel the claimant to *give security for the costs* of the second ejectment (*Doe* d. *Selby* v. *Alston*, 1 T. R. 491), as may now be done under this section.

As to the common law jurisdiction of the courts in staying proceedings in a second action, where the costs of the former unsuccessful action remain unpaid, in other cases than ejectment, see *Prowse* v. *Loxdale* (3 B. & S. 896; L. J. 32, Q. B. 227).

As to writs of execution issued before 24th October, 1853.

94. No writ of execution issued before the twenty-fourth day of October, one thousand eight hundred and fifty-two, if unexecuted, shall remain in force for more than six calendar months after the twenty-fourth day of October, one thousand eight hundred and fifty-four, unless the same be renewed as hereinafter mentioned; but all such writs may be renewed from time to time in the same manner as writs issued after the twenty-fourth day of October, one thousand eight hundred and fifty-two, may now be renewed under the "Common Law Procedure Act, 1852," s. 124.

See *ante*, p. 109.

Courts may appoint sittings.

95. The Superior Courts may appoint and hold sittings either in banco, or for the trial of issues in fact by judge or jury, at any time or times, whether in term or vacation, not being between the tenth of August and the twenty-fourth of October.

This section extends the power conferred by 1 & 2 Vict. c. 32, which only enabled the courts to hold sittings *in banco*, at the times appointed for holding sittings at *nisi prius* in London and Middlesex, for the purpose of disposing of business then pending and undecided; under which statute it was held that the court sitting *in banco* had no power to enlarge the time appointed for sending a commission to a foreign country, or to alter the period within which an award was to be made (*De Rossi* v. *Polhill*, 7 Scott, 836).

This enactment would seem to give to the Superior Courts jurisdiction at Nisi Prius in Middlesex and London, for so long a time as they may see fit from time to time to appoint.

AMENDMENT.

Amendment.

96. It shall be lawful for the Superior Courts of common law, and every judge thereof, and any judge sitting at Nisi Prius, at all times to amend all defects and errors in any proceedings under the provisions of this Act, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all

such amendments may be made with or without costs, and upon such terms, as to the court or judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made, if duly applied for.

This section is in the same words as C. L. P. A. 1852, s. 222 (*ante*, p. 175); except that it is limited "to proceedings under the provisions of this act;" and that the words "*if duly applied for*" have been added.

General Rules.

General rules may be made by the judges.

97. It shall be lawful for the judges of the said courts, or any eight or more of them, of whom the chiefs of each of the said courts shall be three, from time to time to make all such general rules and orders for the effectual execution of this Act, and of the intention and object hereof, and for fixing the costs to be allowed for and in respect of the matters herein contained, and the performance thereof, as in their judgment shall be necessary or proper, and for that purpose to meet from time to time as occasion may require: Provided that nothing herein contained shall be construed to restrain the authority or limit the jurisdiction of the said courts or of the judges thereof to make rules or orders, or otherwise to regulate and dispose of the business therein.

New forms of writs and other proceedings.

98. Such new or altered writs and forms of proceedings may be issued, entered, and taken as may by the judges of the said courts, or any eight or more of them, of whom the chiefs of each of the said courts shall be three, be deemed necessary or expedient for giving effect to the provisions hereinbefore contained, and in such forms as the judges of such courts respectively shall from time to time think fit to order; and such writs and proceedings shall be acted upon and enforced in such and the same manner as writs and proceedings of the said courts are now acted upon and enforced, or as near thereto as the circumstances of the case will admit; and any existing writ or proceeding, the form of which shall be in any manner altered in pursuance of this Act, shall, nevertheless, be of the same force and virtue as if no alteration had been made therein, except as far as the effect thereof may be varied by this Act.

See R. G., M. V. 1854, *post*.

Interpretation.

Interpretations of terms.

99. In the construction of this Act, the word "court" shall be understood to mean any one of the Superior Courts of common law at Westminster; and the word "judge" shall be understood to mean a judge or baron of any of the said courts; and the word "master" shall be understood to mean a master of any of the said courts; and the word "action" shall be understood to mean any personal action in any of the said courts.

The interpretation given in this section to the word "action" differs from that prescribed by the C. L. P. A. 1852, s. 227 (*ante*, p. 181), which enacts that the word "action" shall be understood to mean any personal action, *brought by writ of summons*, in the Superior Courts of Common Law at Westminster.

See also interpretation clause, C. L. P. A. 1860, s. 39 (*post*, p. 325).

The interpretation supplied by this section must necessarily be modified in its application to the Courts of Chancery (*Buckley* v. *Cooke*, 1 K. & J. 29; L. J. 24, Ch. 24); and to inferior courts under the following sections.

Courts of Counties Palatine.

Provisions relating to superior courts to apply to Court of Common Pleas at Lancaster and Court of Pleas at Durham.

100. All the enactments and provisions of this Act not relating exclusively to the sittings for trials of causes or issues in fact at London or Westminster shall extend and apply to the Court of Common Pleas at Lancaster, and the Court of Pleas at Durham, and actions and proceedings therein respectively, subject to the following modifications:—All the powers given by this Act to the judges of the said Superior Courts of common law at Westminster to make general rules and orders shall and may be exercised by the respective judges of the Court of Common Pleas at Lancaster and Court of Pleas at Durham, being judges of one of the said common law courts at Westminster, or any two of them respectively; with respect to the said Court of Common Pleas at Lancaster, and Court of Pleas at Durham, respectively, and matters and proceedings therein within the jurisdiction of the same courts respectively; and all powers under this Act exercisable by any one judge of the Superior Courts at Westminster shall and may be exercisable by one judge of the said Superior Courts of the said counties palatine, being also a judge of one of the said courts at Westminster, as to matters and proceedings in the said Superior Courts of the said counties palatine.

See C. L. P. A. 1852, ss. 229—231 (*ante*, pp. 182—184); and C. L. P. A. 1860, s. 40 (*post*, p. 325).

Where this Act has been thus extended to an inferior Court of Record, the clauses relating to attachment are applicable in that court (*Dawber* v. *Barnes*, L. J. 31, Q. B. 302, Bail Court).

Provisions as to masters of superior courts to apply to prothonotaries of palatinate courts.

101. Provided always, that all the provisions of this Act applicable to masters of the said courts at Westminster shall apply to the respective prothonotaries of the Court of Common Pleas at Lancaster and Court of Pleas at Durham, and their respective deputies acting in the execution of the duties of such offices, which acting officers respectively may singly exercise with reference to matters and proceedings in the last-mentioned courts respectively the powers hereby given to the masters of the Superior Courts at Westminster.

See C. L. P. A. 1852, s. 232 (*ante*, p. 184); and C. L. P. A. 1860, s. 41 (*post*, p. 326).

Court of Queen's Bench to be the court of appeal from palatinate courts.

102. Provided also, as to proceedings in appeal, that the Court of Queen's Bench, being the court of error from the said Court of Common Pleas at Lancaster, and Court of Pleas at Durham respectively, shall also be the court of appeal from the said respective courts for the purposes of this Act in reference to motions for new trials, or to enter verdicts or nonsuits previously made to the judges of the said respective Courts of Common Pleas at Lancaster and Court of Pleas at Durham respectively.

Compare C. L. P. A. 1852, s. 233 (*ante*, p. 185); and C. L. P. A. 1860, s. 42 (*post*, p. 326).

Enactments in ss. 19—32 to apply to every civil court of judicature in England and Ireland.

103. The enactments contained in sections nineteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight, twenty-nine, thirty, thirty-one, and thirty-two of this Act shall apply and extend to every court of civil judicature in England and Ireland.

Commencement of Act.

104. The provisions of this Act shall come into operation on the twenty-fourth day of October, in the year of our Lord one thousand eight hundred and fifty-four.

Her Majesty may direct all or part of this Act to extend to any court of record.

105. It shall be lawful for Her Majesty from time to time, by an order in council, to direct that all or any part of the provisions of this Act, or of the rules to be made in pursuance thereof, shall apply to all or any court or courts of record in England and Wales; and within one month after such order shall have been

made and published in the *London Gazette* such provisions and rules respectively shall extend and apply in manner directed by such order, and any such order may be in like manner from time to time altered and annulled; and in and by any such order Her Majesty may direct by whom any powers or duties incident to the provisions applied under this Act, or "The Common Law Procedure Act, 1852," shall and may be exercised with respect to matters in such court or courts, and may make any orders or regulations which may be deemed requisite for carrying into operation in such court or courts the provisions so applied.

See C. L. P. A. 1852, s. 228 (*ante*, p. 182); and C. L. P. A. 1860, s. 44 (*post*, p. 327).

By an order in council dated the 18th of November, 1867, made under this section, the provisions contained in ss. 50—54, 60—67, and 83—86, were extended to the County Courts and the City of London (*Sheriff's*) Court.

Short title of Act.

106. In citing this Act in any instrument, document, or proceeding, it shall be sufficient to use the expression "The Common Law Procedure Act, 1854."

Act not to extend to Ireland or Scotland.

107. Nothing in this Act shall extend to Ireland or Scotland, save as aforesaid.

THE

COMMON LAW PROCEDURE ACT, 1860.

(23 & 24 VICT. c. 126.)

*An Act for the further Amendment of the Process, Practice, and Mode of Pleading in and enlarging the Jurisdiction of the Superior Courts of Common Law at Westminster.** [28th August, 1860.]

WHEREAS it is desirable further to improve the process, practice, and mode of pleading in, and, in some respects, to enlarge the jurisdiction of, the Superior Courts of Common Law: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

RELIEF AGAINST FORFEITURE.

Relief against forfeiture for non-payment of rent.

1. In the case of any ejectment for a forfeiture brought for non-payment of rent, the court or a judge shall have power, upon rule or summons, to give relief in a summary manner, but subject to appeal as hereinafter mentioned, up to and within the like time after execution executed, and subject to the same terms and conditions in all respects, as to payment of rent, costs and otherwise, as in the Court of Chancery; and if the lessee, his executors, administrators or assigns, shall upon such proceeding be relieved, he and they shall hold the demised lands according to the lease thereof made, without any new lease.

This is supplementary to C. L. P. A. 1852, s. 212 (*ante*,

* This act is based upon the Third and final Report of the Common Law Commissioners, whose recommendations have, notwithstanding the vigorous efforts of the Common Law Commissioners, been only partially adopted by the legislature, in consequence of the extraordinary opposition presented by persons connected with the Courts of Chancery.

p. 165); inasmuch as it enables the courts of common law to administer relief *after* the trial, and within the six months limited by C. L. P. A. 1852, s. 210 (*ante*, p. 162), for the intervention of a court of equity.

See Story's Commentaries on Equity Jurisprudence, § 1301, *et seq.*; also *Peachy* v. *Duke of Somerset*, and notes thereto, in Tudor's Leading Cases in Equity, 2nd ed. vol. ii. p. 895, *et seq.*

Relief against forfeiture for non-insuring.

2. In the case of any ejectment for a forfeiture for breach of a covenant or condition to insure against loss or damage by fire, the court or a judge shall have power, upon rule or summons, to give relief in a summary manner, but subject to appeal as hereinafter mentioned, in all cases in which such relief may now be obtained in the Court of Chancery under the provisions of an act passed in the session of parliament held in the twenty-second and twenty-third years of the present reign, intituled "*An Act to further amend the Law of Property, and to relieve Trustees*," and upon such terms as would be imposed in such court.

22 & 23 Vict. c. 35.

This introduces within the jurisdiction of the courts of common law a relief novel even in Chancery (*Green* v. *Bridges*, 4 Sim. 96); and its importance seems to demand the annexing those provisions of the act which created the jurisdiction in Chancery, which are referred to in the above section.

22 & 23 *Vict. c.* 35.

22 & 23 VICT. c. 35.

An Act to further amend the Law of Property and to relieve Trustees.

Sect. 4. *Relief against forfeiture for breach of covenant to insure in certain cases.*

Section 4. A court of equity shall have power to relieve against a forfeiture for breach of a covenant or condition to insure against loss or damage by fire, where no loss or damage by fire has happened, and the breach has, in the opinion of the court, been committed through accident or mistake, or otherwise without fraud or gross negligence, and there is an insurance on foot at the time of the application to the court in conformity with the covenant to insure, upon such terms as to the court may seem fit.

Sect. 6. *Court not to relieve any person more than once in respect of the same covenant, &c.*

Section 6. The court shall not have power under this act to relieve the same person more than once in respect of the same covenant or condition, nor shall it have power to grant any relief under this act where a forfeiture under the covenant in respect of which relief is sought shall have been already waived out of court in favour of the person seeking the relief.

Sect. 8. *Protection of purchaser against for-*

Section 8.* Where, on the *bonâ fide* purchase after the passing of this act of a leasehold interest under a lease containing a covenant on the part of the lessee to insure against loss or damage by fire, the purchaser is furnished with the written

* This section is added on account of its great general importance, and of its connection with the previous section; although it does not itself affect the *practice* of the courts.

receipt of the person entitled to receive the rent, or his agent, for the last payment of rent accrued due before the completion of the purchase, and there is subsisting at the time of the completion of the purchase an insurance in conformity with the covenant, the purchaser or any person claiming under him shall not be subject to any liability, by way of forfeiture or damages or otherwise in respect of any breach of the covenant committed at any time before the completion of the purchase, of which the purchaser had not notice before the completion of the purchase; but this provision is not to take away any remedy which the lessor or his legal representatives may have against the lessee or his legal representatives for breach of covenant.

Feiture under covenant for insurance against fire in certain cases.

Section 9. The preceding provisions shall be applicable to leases for a term of years absolute, or determinable on a life or lives or otherwise, and also to a lease for the life of the lessee, or the life or lives of any other person or persons.

Sect. 9. Preceding provisions to apply to leases for a term of years absolute, &c.

From the above enactments it follows:—

Firstly. That a breach of covenant to insure will not be relieved against where—

(*a*) It has occurred through gross negligence or fraud; or otherwise than through accident or mistake.

(*b*) Any loss or damage to the premises has been done through the happening of the event that should have been insured against.

(*c*) The premises are not duly re-insured at the time of the application for relief.

(*d*) Any previous relief has been granted by the court to the *same person* * in respect of the same covenant.

(*e*) Any breach of the same covenant has been waived † in favour of the *same person*.

Secondly. That in other cases a breach of covenant to insure may be relieved against by the court or a judge upon such terms as to the court or judge may seem fit.

Thirdly. That a *bonâ fide* purchaser, without notice of a prior breach of covenant to insure, is protected against all consequences of such prior breach; if, on the purchase, he procured a written receipt for the last payment of rent accrued due before the completion of the purchase; and if, at the time of the completion of the purchase, the premises were duly insured.‡

It has been held that, under s. 4, *supra*, relief may be given against forfeiture through a breach, since the passing of the act, of a covenant entered into previously thereto (*Page* v. *Bennett*, 2 Giff. 117; L. J. 29, Ch. 398); see this case also as to costs.

See generally, as to the retroactive effect of statutes, *Cornill* v.

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* *Semble*, the court may relieve *other persons* in respect of the same covenant, although they claim by or under the same title.

† As to waiver of breaches of covenant, see *Dendy* v. *Nicholl* (4 C. B. N. S. 376); *Price* v. *Worwood* (4 H. & N. 512); *Croft* v. *Lumley* (6 H. L. C. 672; L. J. 27, Q. B. 321).

‡ No such provision is needed, nor indeed applicable, in the case of a breach of a covenant *to pay rent;* against which a purchaser may protect himself under the C. L. P. A. 1852, s. 212 (*ante*, p. 165), and the C. L. P. A. 1860, s. 1, *ante*, p. 295).

Hudson, 8 E. & B. 429); *Jackson* v. *Woolley* (8 E. & B. 778), and cases there cited; see also *Moon* v. *Durden* (2 Exch. 22); *Pinhorn* v. *Sonster* (8 Exch. 138; L. J. 21, Ex. 336); *Jenkins* v. *Betham* (15 C. B. 190); *Williams* v. *Smith* (2 H. & N. 443); *Re Miles's Trusts* (27 Beav. 579; L. J. 29, Ch. 47); *Midland Railway Company* v. *Pye* (10 C. B. N. S. 179; L. J. 30, C. P. 314); *Flood* v. *Patterson* (29 Beav. 295; L. J. 30, Ch. 486); and *contra*, *Thompson* v. *Waithman* (3 Drew. 628; L. J. 26, Ch. 134); *Page* v. *Bennett*, *ubi supra*); *Dodson* v. *Sammell* (1 Drew. & S. 575; L. J. 30, Ch. 799); and *Wright* v. *Hale* (6 H. & N. 227; L. J. 30, Ex. 40), where an important distinction is taken between *rights*, and *procedure* and its incidents, such as costs. See generally cases cited in Broom's Maxims, 4th ed. pp. 34—43.

Minute of relief granted.

3. Where such relief shall be granted, the court or a judge shall direct a minute thereof to be made by indorsement on the lease or otherwise.

The words "*such relief*" probably refer to the last antecedent, viz., to relief under s. 2 (*ante*, p. 296), and not to relief under s. 1 (*ante*, p. 295). The object of the enactment in such case would be to provide, in favour of the landlord, evidence of relief having been given by the court, so as to bar further application (22 & 23 Vict. c. 35, s. 6, *ante*, p. 296). If it be held to apply to relief under s. 1, as well as to s. 2, its object would seem to be to provide evidence of the restoration of the term, in favour of the tenant. See, as to construction of C. L. P. A. 1854, s. 8, *Re Morris*, cited, *ante*, p. 209.

Appeal.

Appeal to the court from order of judge.

4. Any order made by a judge upon an application for a relief under the provisions of this act shall be subject to an appeal to the court, and may be discharged, varied or set aside by the court, upon such terms as the court shall think fit, on application made thereto by any party dissatisfied with such order.

The appeal given by this and the following sections (4—11) is limited to appeals from orders that have been made upon applications for relief against forfeitures, under ss. 1, 2 (*ante*, pp. 295, 296).

The term "any party" will probably be restricted to parties to the ejectment, and not be extended to persons otherwise interested, unless they make themselves parties thereto under the C. L. P. A. 1852, s. 172 (*ante*, p. 143).

Jurisdiction of judge at chambers.

Although jurisdiction to grant relief is specifically given to a judge, as distinguished from the court, by the previous sections, and the proceedings upon appeals from his order, made under these provisions, are regulated by the following sections; it may yet be useful to see, as to the jurisdiction of judges at chambers, *Smeeton* v. *Collier* (1 Exch. 457); *Clarke* v. *E. I. Company* (6 D. & L. 278); *R.* v. *Almon* (Wilmot's Notes, 264). Any application to the court, after a previous application for the same purpose to a judge at chambers, is in the nature of an appeal from such judge, even where he only refused to make any order; and it will not therefore be entertained after the lapse of a term

(*Meredith* v. *Gittens*, 18 Q. B. 257; L. J. 21, Q. B. 273; *Orchard* v. *Moxey*, 2 E. & B. 206; *Craske* v. *Smith*, 4 C. B. N. S. 446; *Worman* v. *Halahan*, L. J. 30, Q. B. 48; *Oldham Manufacturing & Building Company* v. *Heald*, 3 H. & C. 132; L. J. 33, Ex. 236). Such of the materials used before the judge as are relevant to the case should be brought before the court, upon the rule *nisi* being applied for (*Hoby* v. *Pritchard*, 5 Dowl. 300; *Pocock* v. *Pickering*, 18 Q. B. 739; L. J. 21, Q. B. 365; *Worman* v. *Halahan*, *ubi supra*; *Mitchell* v. *Harding*, 5 L. T. N. S. 348, Q. B. M. T. 1861; *Bennett* v. *Benham*, 15 C. B. N. S. 616; L. J. 33, C. P. 153; together with an affidavit stating the proceedings thereon, at least when the counsel moving the rule was not concerned in the matter at chambers (*Jackson* v. *Shorter*, 2 Weekly Notes, 1867, p. 44, C. P. H. T); and also on renewing applications to the court; but additional materials may also be used (*Peterson* v. *Davis*, 6 C. B. 235; *Sanderson* v. *Proctor*, 10 Exch. 189). Where a judge has made an order on an *ex parte* statement, the other party must apply to the judge to reconsider his order before applying to the court to set it aside (*Day* v. *Vincent*, 9 L. T. N. S. 624, Ex. H. T. 1864). No appeal lies from one judge at chambers to another (*Wright* v. *Stevenson*, 5 Taunt. 850); but it lies to the court, even where by statute a special jurisdiction is conferred upon a single judge (*Teggin* v. *Langford*, 10 M. & W. 556), but not where the jurisdiction of the court is excluded (*Wearing* v. *Smith*, 9 Q. B. 1024); nor in ordinary cases, where the matter is by the statute left entirely in his *discretion* (*Burman* v. *Howard*, L. J. 25, Ex. 289; *Cartwright* v. *Frost*, 3 H. & N. 278; *Holden* v. *Ballantyne*, L. J. 29, Q. B. 148). Where a judge makes an order and, exercising a discretionary power, gives costs as prayed but annexes a condition thereto, the court will not interfere to remove the condition, even though the order has not been drawn up (*Bartlett* v. *Stinton*, L. R. 1 C. P. 483). Where a rule *nisi*, by way of appeals to rescind the order of a judge, is discharged, it is usual to discharge it with costs unless the point raised is new and difficult (*Hawkins* v. *Carr*, L. R. 1 Q. B. 89).

Jurisdiction of master at chambers. *30 & 31 Vict. c. 68.*

The jurisdiction of the judges at chambers has by the very recent statute, 30 & 31 Vict. c. 68, been extended to the masters of the courts, subject to such rules as the judges may make under the powers of that act (see R. G. M. T. 1867, *post*), the act expressly reserving a right of appeal to a judge from the master's decision.

The provisions of this act, which will be found printed *in extenso* (*post*, p. 345), are shortly as follows:—

Sect. 1.

Section 1 enacts, that a majority of all the judges of the three courts of common law (which majority shall include two of the chiefs), may make rules—

(1) For empowering the masters of the courts to transact any business, and to exercise therein the same authority as a judge sitting in chambers now has, except in matters relating to the liberty of the subject.

(2) For regulating the attendance of the masters, the course of practice, and scale of costs to be adopted.

(3) For fixing fees.

Under the powers of the above section, R. G. M. T. 1867, *post*, have been framed.

Sect. 2.

Section 2 enacts, that the rules made under this act shall be read in each court ten days before they come into operation, and be published in the London Gazette.

Sect. 3. Section 3 enacts, that the rules shall be laid before Parliament.

Sect. 4. Section 4 gives a right of appeal from the decision of a master to a judge sitting at chambers, such appeal to be made forthwith, or within the time appointed by the rules to be made under this act, and subject to such conditions as to costs, as may be provided under the rules. See R. G. M. T. 1867, *post*.

The act contains no provision for a further appeal from the judge's decision to the court, but it is presumed that the act, which by its title professes "to provide for the better despatch of business in the chambers of the judges," was not intended to interfere with the suitor's right in ordinary cases to have the judge's decision reviewed by the court, merely because the matter came originally before the master. See *Teggin* v. *Langford* (10 M. & W. 566).

Power to appeal from order of court.

5. It shall be lawful for the party against whom the court makes any rule or order in respect of such relief to appeal from such rule or order.

The powers of the Court of Appeal are conferred by ss. 10, 11 (*post*, p. 301).

Courts of error to be courts of appeal.

6. The Courts of Error shall be Courts of Appeal for the purposes of this Act.

This section differs somewhat from C. L. P. A. 1854, s. 36 (*ante*, p. 241), in speaking of "Courts" and not "Court" of Error, and in omitting to particularize the "Exchequer Chamber and the House of Lords;" but the effect would seem to be the same; and an appeal under s. 5, *supra*, may well be carried to the House of Lords.

See as to appeals from the Court of Common Pleas at Lancaster and the Court of Pleas at Durham, s. 42, *post*; and compare C. L. P. A. 1852, s. 233 (*ante*, p. 185), and C. L. P. A. 1854, s. 102 (*ante*, p. 293).

Notice of appeal.

7. No appeal shall be allowed unless notice thereof be given in writing to the opposite party or his attorney, and to one of the masters of the court, within four days after the decision complained of, or such further time as may be allowed by the court or a judge.

This section is textually taken from the C. L. P. A. 1854, s. 37 (*ante*, p. 242); and see note thereto.

It would seem to apply to appeals from a judge under s. 4 (*ante*, p. 298), as well as from the court under s. 5, *supra*; *sed quære*.

Bail.

8. Notice of appeal shall be a stay of execution, provided bail to pay the sum demanded and costs be given, in like manner and to the same amount as bail in error, within eight days after the decision complained of, or before execution delivered to the sheriff.

This, subject to necessary difference *ex materiâ*, is in the same terms as C. L. P. A. 1854, s. 38 (*ante*, p. 242); see note thereto.

By "the sum demanded," is probably meant the sum ordered by the judge or court to be paid by the defendant as a condition of relief.

This section would also seem to apply to appeals from a judge.

Form of appeal.

9. The appeal hereinbefore mentioned shall be upon a case to be stated by the parties (and in case of difference to be settled by the court, or a judge of the court appealed from), in which case shall be set forth so much of the pleadings, facts, and the order, rule, or judgment objected to as may be necessary to raise the question for the decision of the Court of Appeal.

This section is, *mutatis mutandis*, taken from the C. L. P. A. 1854, s. 39 (*ante*, p. 242), but as there are no pleadings in ejectment it was scarcely necessary to provide for setting forth the "pleadings" in the case.

Judgment of court of appeal, and power to remit proceedings.

10. The Court of Appeal shall give such judgment or make such rule as ought to have been given or made in the court below, and shall have power to remit the cause, with such directions as they shall think proper; and all such further proceedings may be taken thereupon as if the judgment or rule had been given or made by the court below.

This section is somewhat altered from the C. L. P. A. 1854, s. 41 (*ante*, p. 243), inasmuch as it gives the court of appeal an additional power of remitting the cause *with directions* to the court below.

See note to C. L. P. A. 1854, s. 41 (*ante*, p. 243).

Power of court of appeal as to costs, &c.

11. The Court of Appeal shall have power to adjudge payment of costs and to order restitution.

This section differs from the C. L. P. A. 1854, s. 42 (*ante*, p. 243), only inasmuch as it omits the power, given to the court of appeal by the earlier enactment, of awarding process; after it had previously provided that the judgment or rule of the court of appeal might be proceeded upon, as if given or made by the court below. The further omission of the words "and otherwise" can scarcely be construed to deprive the court of appeal of the power necessarily inherent in all superior courts, of regulating its own proceedings, and even of quashing proceedings before them when taken against good faith (see C. L. P. A. 1852, s. 156, and note *ante*, p. 133).

See as to restitution, *Doe* d. *Whittington* v. *Hards* (L. J. 20, Q. B. 406); and *Davies* v. *Povey* (2 W. Bl. 892).

Interpleader Proceedings.

Interpleader may be granted, though titles have not a

12. Where an action has been commenced in respect of a common law claim for the recovery of money or goods, or where goods or chattels have

common origin.

been taken or are intended to be taken in execution under process issued from any one of the Superior Courts, or from the Court of Common Pleas at *Lancaster* or the Court of Pleas at Durham, and the defendant in such action, or the sheriff or other officer, has applied for relief under the provisions of an act made and passed in the session of parliament held in the first and second year of the reign of his late Majesty King *William* the Fourth, intituled "*An Act to enable Courts of Law to give Relief against adverse Claims made upon Persons having no Interest in the Subject of such Claims*," it shall be lawful for the court or a judge to whom such application is made, to exercise all the powers and authorities given to them by this Act and the hereinbefore-mentioned Act passed in the session of parliament held in the first and second years of the reign of his late Majesty King *William* the Fourth, though the titles of the claimants to the money, goods, or chattels in question, or to the proceeds or value thereof, have not a common origin, but are adverse to and independent of one another.

1 & 2 Will. 4, c. 58.

Interpleader at law was previously dependent upon, and regulated by, the 1 & 2 Will. 4, c. 58; 1 & 2 Vict. c. 45, s. 2; and 8 & 9 Vict. c. 109, s. 19, which, on account of their importance, are set out below.*

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1 & 2 Will. 4, c. 58.

* 1 & 2 WILL. 4, c. 58.

An Act to enable Courts of Law to give Relief against adverse Claims made upon Persons having no Interest in the Subject of such Claims. [20th October, 1831.]

WHEREAS it often happens that a person sued at law for the recovery of money or goods wherein he has no interest, and which are also claimed of him by some third party, has no means of relieving himself from such adverse claims but by a suit in equity against the plaintiff and such third party, usually called a bill of interpleader, which is attended with expense and delay; for remedy thereof be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons in this present Parliament assembled, and by the authority of the same, that upon application made by or on the behalf of any defendant sued in any of his Majesty's Courts of Law at Westminster, or in the Court of Common Pleas of the County Palatine of Lancaster, or the Court of Pleas of the County Palatine of Durham, in any action of assumpsit, debt, detinue or trover, such application being made after declaration, and before plea, by affidavit or otherwise, showing that such defendant does not claim any interest in the subject-matter of the suit, but that the right thereto is claimed

Upon application by a defendant in an action of *assumpsit*, &c. stating that the right in the subject-matter is in a third party, the

Interpleader at law is of two kinds:—between persons generally;—and (for the relief of sheriffs and other officers) between

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or supposed to belong to some third party who has sued or is expected to sue for the same, and that such defendant does not in any manner collude with such third party, but is ready to bring into court or to pay or dispose of the subject-matter of the action in such manner as the court (or any judge thereof) may order or direct, it shall be lawful for the court, or any judge thereof, to make rules and orders calling upon such third party to appear and to state the nature and particulars of his claim, and maintain or relinquish his claim, and upon such rule or order to hear the allegations as well of such third party as of the plaintiff, and in the meantime to stay the proceedings in such action, and finally to order such third party to make himself defendant in the same or some other action, or to proceed to trial on one or more feigned issue or issues, and also to direct which of the parties shall be plaintiff or defendant on such trial, or, with the consent of the plaintiff and such third party, their counsel or attornies, to dispose of the merits of their claims and determine the same in a summary manner, and to make such other rules and orders therein, as to costs and all other matters, as may appear to be just and reasonable.

court may order such third party to appear and maintain or relinquish his claim, and in the meantime stay proceedings in such action.

II. And be it further enacted, that the judgment in any such action or issue as may be directed by the court or judge, and the decision of the court or judge in a summary manner, shall be final and conclusive against the parties, and all persons claiming by, from, or under them.

Judgment and decision to be final.

III. And be it further enacted, that if such third party shall not appear upon such rule or order to maintain or relinquish his claim, being duly served therewith, or shall neglect or refuse to comply with any rule or order to be made after appearance, it shall be lawful for the court or judge to declare such third party, and all persons claiming by, from, or under him, to be for ever barred from prosecuting his claim against the original defendant, his executors or administrators; saving nevertheless the right or claim of such third party against the plaintiff; and thereupon to make such order between such defendant and the plaintiff, as to costs and other matters, as may appear just and reasonable.

If such third party shall not appear, &c. the court may bar his claim against the original defendant.

IV. Provided always, and be it further enacted, that no order shall be made in pursuance of this act by a single judge of the Court of Pleas of the said County Palatine of Durham who shall not also be a judge of one of the said courts at Westminster, and that every order to be made in pursuance of this act by a single judge not sitting in open court shall be liable to be rescinded or altered by the court in like manner as other orders made by a single judge.

Proviso as to orders made by a single judge.

V. Provided also, and be it further enacted, that if upon application to a judge, in the first instance, or in any later stage of the proceedings, he shall think the matter more fit for the decision of the court, it shall be lawful for him to refer the matter to the court; and thereupon the court shall and may hear and dispose of the same in the same manner as if the proceeding had originally commenced by rule of court, instead of the order of a judge.

If a judge thinks the matter more fit for the decision of the court, he may refer it.

VI. And whereas difficulties sometimes arise in the execution of process against goods and chattels, issued by or under the

For relief of sheriffs and

execution creditors, and persons claiming goods seized in execution.

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other officers in execution of process against goods and chattels.

authority of the said courts, by reason of claims made to such goods and chattels by assignees of bankrupts and other persons, not being the parties against whom such process has issued, whereby sheriffs and other officers are exposed to the hazard and expense of actions; and it is reasonable to afford relief and protection in such cases to such sheriffs and other officers; be it therefore further enacted, that when any such claim shall be made to any goods or chattels taken or intended to be taken in execution under any process, or to the proceeds or value thereof, it shall and may be lawful to and for the court from which such process issued, upon application of such sheriff or other officer made before or after the return of such process, as well before as after any action brought against such sheriff or other officer, to call before them, by rule of court, as well the party issuing such process as the party making such claim, and thereupon to exercise, for the adjustment of such claims and the relief and protection of the sheriff or other officer, all or any of the powers and authorities hereinbefore contained, and make such rules and decisions as shall appear to be just, according to the circumstances of the case: and the costs of all such proceedings shall be in the discretion of the court.

Rules, orders, &c. made in pursuance of this act may be entered of record and made evidence.

VII. And be it further enacted, that all rules, orders, matters and decisions to be made and done in pursuance of this act, except only the affidavits to be filed, may, together with the declaration in the cause (if any), be entered of record, with a note in the margin expressing the true date of such entry, to the end that the same may be evidence in future times, if required, and to secure and enforce the payment of costs directed by such rule or order; and every such rule or order so entered shall have the force and effect of a judgment, except only as to becoming a charge on any lands, tenements, or hereditaments; and in case

Costs.

any costs shall not be paid within fifteen days after notice of the taxation and amount thereof given to the party ordered to pay the same, his agent or attorney, execution may issue for the same by *fieri facias* or *capias ad satisfaciendum*, adapted to the case, together with the costs of such entry, and of the execution, if by

Writs.

fieri facias; and such writ and writs may bear teste on the day of

Sheriff's fees.

issuing the same, whether in term or vacation; and the sheriff or other officer executing any such writ shall be entitled to the same fees, and no more, as upon any similar writ grounded upon a judgment of the court.

Upon any application under 1 Will. 4, c. 21, and this act, the court to exercise such powers and make such rules as are given by or mentioned in this act.

VIII. And whereas by a certain act made and passed in the last session of parliament, intituled "*An Act to improve the Proceedings in Prohibition and on Writs on Mandamus*," it was among other things enacted, that it should be lawful for the court to which application may be made for any such writ of mandamus as is therein in that behalf mentioned, to make rules and orders calling not only upon the person to whom such writ may be required to issue, but also all and every other person having or claiming any right or interest in or to the matter of such writ, to show cause against the issuing of such writ and payment of the costs of the application, and upon the appearance of such other person in compliance with such rules, or, in default of appearance after service thereof, to exercise all such powers and autho-

1. BETWEEN CLAIMANTS GENERALLY.—This kind of interpleader is now based upon and regulated by the 1 & 2 Will. 4, c. 58, and other statutes, which see *infra*; and by the present statute.

INTERPLEADER BETWEEN CLAIMANTS GENERALLY.

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rities, and to make all such rules and orders applicable to the case, as were or might be given or mentioned by or in any act passed or to be passed during that present session of parliament for giving relief against adverse claims made upon persons having no interest in the subject of such claims; and whereas no such act was passed during the then present session of parliament, be it therefore enacted, that upon any such application as is in the said act and hereinbefore mentioned, it shall be lawful for the court to exercise all such powers and authorities, and make all such rules and orders applicable to the case, as are given or mentioned by or in this present act.

1 & 2 VICT. c. 45.

1 & 2 Vict. c. 45.

An Act (inter alia) *to extend the Jurisdiction of the Judges of the Superior Courts of Common Law.*

Sect. 2. Whereas by another act passed in the second year of the reign of his late Majesty king William the fourth, intituled, "*An Act to enable the Courts of Law to give Relief against adverse Claims made upon Persons having no interest in the subject of such Claims*," provision is made for the relief of sheriffs and other officers concerned in the execution of process issued out of any of his Majesty's courts of law at Westminster, or of the court of Common Pleas of the county palatine of Lancaster, or the Court of Pleas of the county palatine of Durham, against goods and chattels by reason of claims made to such goods and chattels, but such relief can only be given by rule of court: and whereas it is expedient that a single judge should possess the power of giving relief in that respect, be it further enacted, that it shall be lawful for any judge of the said Courts of Queen's Bench, Common Pleas, or Exchequer, with respect to any such process issued out of any of those courts, or for any judge of the said Court of Common Pleas of the county palatine of Lancaster, or Court of Pleas of the county palatine of Durham (being also a judge of one of the said three superior courts), with respect to process issued out of the said courts of Lancaster and Durham respectively, to exercise such powers and authorities for the relief and protection of the sheriff or other officer as may by virtue of the said last-mentioned act be exercised by the said several courts respectively, and to make such order therein as shall appear to be just, and the costs of such proceedings shall be in the discretion of such judge.

Sect. 2. Any judge may exercise such powers for the relief of sheriffs, &c. as may by virtue of 1 & 2 Will. 4, c. 58, s. 6, be exercised by the several courts.

Costs of such proceedings.

8 & 9 VICT. c. 109.

8 & 9 Vict. c. 109.

An Act to amend the Law concerning Games and Wagers.

Sect. 19. And whereas many important questions are now tried in the form of feigned issues, by stating that a wager was laid between two parties interested in respectively maintaining the affirmative and the negative of certain propositions, but such questions may be as satisfactorily tried without such form, be it therefore enacted, that in every case where any court of law or

Sect. 19. Proceedings under feigned issues abolished.

General principles.

The general principles recognized in its application are:—

That the person applying that others may be required to interplead be already defendant in an action at the suit of one of them;

That such action be strictly such as formerly came under the denominations specified in 1 & 2 Will. 4, c. 58, s. 1 (*Lawrence* v. *Mathews*, 5 Dowl. 149);

That the claims of both claimants be in respect of the very same matter (*Slaney* v. *Sidney*, 14 M. & W. 800);

That they both be of a *legal*, as distinguished from a merely *equitable*, character (*Roach* v. *Wright*, 8 M. & W. 155; *Frost* v. *Heywood*, 2 Dowl. N. S. 801); but see *Putney* v. *King* (5 M. & W. 425); *

That the party applying claim no interest in the matter in dispute (*Braddick* v. *Smith*, 9 Bing. 84; *Cotter* v. *Bank of England*, 2 Dowl. 728; *Smith* v. *Wheeler*, 3 Dowl. 431; *Grant* v. *Fry*, 4 Dowl. 135; *Slaney* v. *Sidney*, *ubi supra*);

That the applicant be not colluding with either party (*Belcher* v. *Smith*, 9 Bing. 82; *Tucker* v. *Morris*, 1 Cr. & M. 73);

That the applicant be in possession of the matter in dispute, and thus able to obey such order as may be made thereabout (*Allen* v. *Gilby*, 3 Dowl. 143; *Inland* v. *Bushell*, 5 Dowl. 147);

That the same question be raisable upon the interpleader issue, as was in dispute between the original parties (*Baker* v. *Bank of Australasia*, 1 C. B. N. S. 515; L. J. 26, C. P. 93).

Formerly there was also another rule introduced from the practice of the courts of equity on interpleader bills, viz., that the applicant be not under a special obligation towards either claimant in respect of the matter in dispute (*Crawshay* v. *Thornton*, 2 Myl. & Cr. 1; *Farr* v. *Ward*, 2 M. & W. 844; *James* v. *Pritchard*, 7 M. & W. 216; *Turner* v. *Mayor, &c. of Kendal*, 13

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equity may desire to have any question of fact decided by a jury, it shall be lawful for such court to direct a writ of summons to be sued out, by such person or persons as such court shall think ought to be plaintiff or plaintiffs, against such person or persons as such court shall think ought to be defendant or defendants therein, in the form set forth in the second schedule to this act annexed, with such alterations or additions as such court may think proper: and thereupon all the proceedings shall go on and be brought to a close in the same manner as is now practised in proceedings under a feigned issue.

SCHEDULE 2.

In the Court of Queen's Bench ["Common Pleas," *or* "Exchequer," *or in any inferior court, as the case may be*].

Middlesex to wit [*or such other county as may be directed*].

Whereas A. B. affirms, and C. D. denies [*here state fully the fact or facts in issue*], and the Lord Chancellor [*or such other court, &c.*] is desirous of ascertaining the truth by the verdict of a jury, and both parties pray that the same may be inquired of by the country: Now let a jury, &c.

* The recommendation of the Common Law Commissioners (Third Report, p. 10), that in case of interpleader for relief of sheriffs, jurisdiction should be given to the common law courts, even though the claim or claims be all equitable, has not been adopted by the legislature, in consequence of the opposition referred to in the note to p. 295, *ante*.

M. & W. 171; *Lindsay* v. *Barron*, 6 C. B. 291; *Horton* v. *Earl of Devon*, 4 Ex. 497; *Oriental Bank* v. *Nicholson*, 5 W. R. 587, Ch., Stuart, V. C., E. T. 1857): this rule is, however, altered by the present section. In *Meynell* v. *Angell* (L. J. 32, Q. B. 14), the plaintiff had contracted as principal with the defendant to complete certain work, and had completed it, and received part of the price, when C. gave notice to the defendant that the contract had been made by the plaintiff as the agent of C., and warned the defendant not to pay to the plaintiff the remainder of the price. The plaintiff then commenced an action against the defendant, who sought to make the plaintiff and C. interplead. It was held by Blackburn, J., in the Bail Court, that, whether the facts above stated brought the case within the rule acted upon in *James* v. *Pritchard* (7 M. & W. 216), and the other cases above cited, or not, yet that the latter provision of this enactment certainly applied; and he ordered interpleader accordingly. This case was approved by the Court of Exchequer in *Best* v. *Hayes* (1 H. & C. 718; L. J. 32, Ex. 129), where the defendant, an auctioneer, was intrusted by the plaintiff with furniture to sell for him, and the defendant having sold, and part of the proceeds being in his hands, received a notice from G. that she claimed the goods. An interpleader order as to the balance in the defendant's hands, after deducting his commission, was granted between the plaintiff and G., the latter being willing to allow the commission and take the issue. So in *Tanner* v. *European Bank, Lim.* (L. R. 1, Ex. 261), A. sued the defendants to whom he had intrusted a policy for certain specified purposes, and declared in trover and detinue and specially on the contract. B., who had pledged the policy with A., brought an action against the same defendants for the recovery of the policy. Bramwell, B., made an interpleader order, directing that the first action should be stayed till further order, that A. should be at liberty to defend the second action, indemnifying the defendants, and that B. should give the defendants security for costs. The Court of Exchequer, following *Best* v. *Hayes* (*ubi supra*), held that this order was right.

The crown cannot be made to interplead, not being named in the statute (*Candy* v. *Maugham*, 1 D. & L. 745).

It has been doubted whether a foreigner beyond the jurisdiction can be required to interplead (*Paterni* v. *Campbell*, 12 M. & W. 277); but consult now spirit of C. L. P. A. 1852, s. 19 (*ante*, p. 27).

Upon the practice it is only necessary to observe— *Practice.*

That the application cannot be made before declaration, nor after plea actually pleaded;

That it should ordinarily be made at chambers;

That if two actions be pending, application must be made in each (*Allen* v. *Gilby*, 3 Dowl. 143);

That the application must be supported by affidavit setting forth the facts that bring the case within the statute, as above stated (*Webster* v. *Delafield*, 7 C. B. 187); and denying collusion (*per* Parke, B., in *Bond* v. *Woodhall*, 4 Dowl. 351);

That if the claimant does not appear and persist in his claim, an order barring his claim will be made, and ordinarily without costs (*Lambert* v. *Cooper*, 5 Dowl. 547; *Jones* v.

Lewis, 8 M. & W. 264; *Grazebrook* v. *Pickford*, 10 M. & W. 279);

That if he persists in his claim, and the case be fit for interpleader, he will be made defendant in lieu of the original defendant; or an issue (8 & 9 Vict. c. 109, s. 19, and Sched. 2, *ante*, p. 306, n.) will be ordered; or the claims may be disposed of in a summary manner under the provisions of the 1 & 2 Will. 4, c. 58, s. 1 (*ante*, p. 302), or under ss. 14 or 15 of this act;

That the order should provide for the *interim* protection of the matter in dispute;—and, in the case of money, by requiring it to be brought into court (*Allen* v. *Gilby*, 3 Dowl. 143);

That the costs generally, as between the claimants, rest entirely in the discretion of the judge; and are disposed of after, and ordinarily in accordance with, the event (*Melville* v. *Smark*, 3 M. & G. 57; *Cusel* v. *Pariente*, 7 M. & G. 527).

SHERIFFS INTERPLEADER.

2. BETWEEN EXECUTION CREDITORS AND PERSONS CLAIMING GOODS SEIZED IN EXECUTION.—Interpleader in such cases depends upon the 1 & 2 Will. 4, c. 58, s. 6; 1 & 2 Vict. c. 45, s. 2 (*ante*, pp. 303—305); and the present statute. As it was introduced for the relief of sheriffs, and of other officers executing process, it is much favoured by the legislature in its enactments, and by the courts in their interpretation of them.

General principles and practice.

The principles and practice above noted may be considered applicable to proceedings in interpleader upon the application of a sheriff or other officer, subject to the following differences:—

A sheriff may successfully apply for an interpleader order, although no action has been commenced against him, provided that a *bonâ fide* legal claim has been actually made to goods lawfully seized (*Holton* v. *Guntrip*, 3 M. & W. 145) by him (*Isaac* v. *Spilsbury*, 10 Bing. 3; *Green* v. *Brown*, 3 Dowl. 337); a claim by a partner (*qud* partner) is not within the acts (*Holmes* v. *Mentze*, 4 A. & E. 127); nor is mere notice of other writs (*Salmon* v. *James*, 1 Dowl. 369; *Day* v. *Waldock*, *Ib.* 523); or of bankruptcy (*Bentley* v. *Hook*, 2 Cr. & M. 426).

The sheriff is not entitled to call upon a claimant to interplead, where the sheriff has committed some injury, distinct from the mere seizure of the goods (*Hollier* v. *Laurie*, 3 C. B. 334; but see *Winter* v. *Bartholomew*, 11 Ex. 704; and *Mercer* v. *Stanbury*, L. J. 25, Ex. 316): and here it may be noticed that the acceptance by the execution creditor of an issue is not an affirmance of previous torts committed by the sheriff (*Woollen* v. *Wright*, 1 H. & C. 554; L. J. 32, Ex. 513, Ex. Ch). Where goods have been wrongfully seized under a *fi. fa.*, and are afterwards sold under an interpleader order, the execution creditor is not liable for any loss that may accrue by such sale, or by any proceedings subsequent to the interpleader order (*Walker* v. *Olding*, 1 H. & C. 621).

The sheriff need not by his affidavit deny collusion (*Bond* v. *Woodhall*, 4 Dowl. 351).

The sheriff may disentitle himself to relief by collusion, or by taking an indemnity (*per* Patteson, J.; *Ostler* v. *Bower*, 4 Dowl. 605); or by being interested personally, or by his under-sheriff (*Ostler* v. *Bower*, *ubi supra*); or where he has himself brought the claim about (*Cox* v. *Baine*, 2 D. & L. 718); or where he has acted upon his own discretion in the matter of the dispute (*Crump* v. *Day*, 4 C. B. 760; *Tufton* v. *Harding*, L. J. 29, Ch. 225; but see

upon these latter points, *Holt* v. *Frost*, 3 H. & N. 821); or where he has been negligent (*Brackenbury* v. *Laurie*, 3 Dowl. 180); or where the application is unreasonably delayed (*Mutton* v. *Young*, 4 C. B. 371; *Tufton* v. *Harding*, L. J. 29 Ch. 225; and see *Bagshaw* v. *Farnsworth*, 2 L. T. N. S. 390, Ex. T. T. 1860, where an interpleader rule was refused to a sheriff who had seized crops supposed to be growing, but not above the ground).

The execution creditor is entitled to be the defendant upon the feigned issue. See *Shingler* v. *Holt* (7 H. & N. 65; L. J. 30, Ex. 322), where a married woman was the claimant, and a verdict that the goods were hers as against the execution creditor, was supported.

Proceedings against the sheriff will be stayed pending the issue.

If the execution creditor does not appear upon the sheriff's application to interplead, the sheriff will be ordered to withdraw, or to pay over the proceeds of the goods if sold; and he will be protected against any claim of the execution creditor in respect thereof (*Eveleigh* v. *Salisbury*, 3 Bing. N. C. 298); but the execution creditor will not, according to the better opinion, be liable to costs, in ordinary cases. Where the claimant fails to appear, his claim to the goods, and against the sheriff, will be barred; but any remedy that he may have against the execution creditor will be left open (*Ford* v. *Dilly*, 5 B. & Ad. 885, and cases there cited); and he will not be liable to costs.

The costs are in the discretion of the judge, and are ordinarily disposed of after the claim has been abandoned, or otherwise finally determined; and generally follow the event (*Staley* v. *Bedwell*, 10 A. & E. 145). If the sheriff does not successfully support his application it may, and often will, be dismissed with costs (*Anderson* v. *Calloway*, 1 C. & M. 182; *Re Sheriff of Oxfordshire*, 6 Dowl. 136). He will rarely be allowed any costs, because the relief sought is purely beneficial to himself (*Cox* v. *Fenn*, 7 Dowl. 50; *Jones* v. *Lewis*, 8 M. & W. 264; *Gebhardt* v. *Rose*, 2 Weekly Notes, 1867, p. 19, C. P. H. T.)

The right of the sheriff to poundage fees, and expenses of execution, is dependent upon the validity of the seizure; and therefore abides the event of the claim (*Clark* v. *Chetwode*, 4 Dowl. 635); but he may entitle himself to possession money for possession after the order, either by consent, or by order of the judge (*Dabbs* v. *Humphries*, 1 Bing. N. C. 412; *Bland* v. *Delano*, 6 Dowl. 293); and where the parties come, after any issue has been directed, to an arrangement, he is entitled to possession money from the date of the order (*Scales* v. *Sargeson*, 4 Dowl. 231); and if the execution creditor recovers any portion of his debt, the sheriff may be entitled to his charges *pro tanto*.

These interpleader sections do not apply to interpleader in Chancery, or in the county courts.

As to interpleader in Chancery by sheriffs, see *Tufton* v. *Harding* (L. J. 29, Ch. 225); *Child* v. *Mann* (L. R. 3, Eq. 806).

As to interpleader in the county courts, see 9 & 10 Vict. c. 95, s. 118; 19 & 20 Vict. c. 108, s. 72; and C. C. Rules 130—133.

It may not be amiss to add here, although it does not strictly come within the present subject, the important provision contained in "The Bankruptcy Act, 1861," s. 74, relating to sales by sheriffs under judgments, where the amount claimed in the action exceeds 50*l*., which is as follows:—"Wherever the goods and chattels of a debtor are sold under an execution upon any judg-

ment recovered in any action or suit brought for the recovery of a debt, money demand, or damages against any debtor, exceeding fifty pounds, such goods and chattels shall in all cases, unless the court shall otherwise direct, be sold by the sheriff by public auction, and not by bill of sale or private contract, and such sale shall be publicly advertised by the sheriff on and during three days next preceding the day of sale.

It has been held that the sheriff is not entitled to deduct from the proceeds of the sale his expenses of advertising under this enactment (*Braithwaite* v. *Marriott*, 1 H. & C. 591; L. J. 32, Ex. 24).

Interpleader is not an "action" within the meaning of the 1 Will. 4, c. 22, s. 4, *ante*, p. 246 (*In the Matter of the Mersey Dock Board*, 11 W. R. 283, Q. B. H. T. 1863).

Court or judge may direct sale of goods seized in execution.

13. When goods or chattels have been seized in execution by a sheriff or other officer under process of the above-mentioned courts, and some third person claims to be entitled under a bill of sale or otherwise to such goods or chattels, by way of security for a debt, the court or a judge may order a sale of the whole or part thereof, upon such terms as to payment of the whole or part of the secured debt or otherwise as they or he shall think fit, and may direct the application of the proceeds of such sale in such manner and upon such terms as to such court or judge may seem just.

This section confers new and valuable powers. Hitherto, if the claimant established a title to goods, of however great value, by way of security for however small a sum, the execution was defeated absolutely; as the court had no power to provide for the realization of the security, and the disposal of the surplus; or for the payment of the debt, and discharge of the security by the execution creditor. This defect is now mended; and a convenient and much used scheme for defeating creditors is interrupted.

It would seem that this section is, strictly speaking, applicable whether the debt be *solvendum in præsenti*, or *in futuro*; and hardship might thus, in many cases, be wrought upon both creditors and debtors, if the exercise of the power vested in the judges did not, as it does, rest in their discretion.* The common law commissioners recommended (Third Report, p. 11), that "the judge ought to have power in all cases where the right of the claimant is only by way of security for a debt, to direct a sale, and the application of the proceeds, in case of a surplus, to satisfy the execution upon such terms, as to payment of the secured debt or not, and otherwise, as the judge may think fit."

Power to court or judge to decide sum-

14. Upon the hearing of any rule or order calling upon persons to appear and state the nature and particulars of their claims, it shall be lawful for the court

* The word "may" is often used in a conditionally imperative sense (*Oraks* v. *Powell*, 2 E. & B. 210); but the context above points to an absolutely free discretion (*Ritchie* v. *Van Gelder*, 9 Exch. 762).

or judge wherever, from the smallness of the amount in dispute or of the value of the goods seized, it shall appear to them or him desirable and right so to do, at the request of either party, to dispose of the merits of the respective claims of such parties, and to determine the same in a summary manner, upon such terms as they or he shall think fit to impose, and to make such other rules and orders therein as to costs and all other matters as may be just.

marily in certain cases.

Hitherto, the consent of *both* parties was necessary to give such a jurisdiction to the court, or to a judge (1 & 2 Will. 4, c. 58, s. 1, *ante*, p. 302; *Curlewis* v. *Pocock*, 5 Dowl. 381; *Harrison* v. *Wright*, 13 M. & W. 816): now the court or judge may, in the exercise of its or his discretion, upon the ground of the smallness of the amount in dispute, or of the value of the goods seized, assume jurisdiction at the request of *either* party; and neither the exercise of this discretion by a judge, nor the correctness of his decision, can be reviewed (s. 17, *post*, p. 312).

15. In all cases of interpleader proceedings where the question is one of law, and the facts are not in dispute, the judge shall be at liberty, at his discretion, to decide the question without directing an action or issue, and, if he shall think it desirable, to order that a special case be stated for the opinion of the court.

Special case may be stated where facts undisputed.

This section is also novel, and seems even more arbitrary than s. 14, *supra*. It would indeed have been well to prevent a waste of costs, in taking down an issue to trial when a question of law is alone in dispute; and there can be no objection in such case to allow a judge, at his own discretion, to decide such question in a summary manner, in the first instance, without any consent of either party; but it is certainly entrusting much to a single judge to make the grant of an appeal from his decision *at chambers*, depend entirely (s. 17, *post*, 312) upon *his thinking it desirable!* Once a judge has thought an appeal from his decision a *desirable thing*, every facility is thenceforth afforded by s. 16, *infra*, for further litigation; and this will probably lead to conditions being often imposed by a judge, as heretofore at *Nisi Prius*, upon reserving a point (C. L. P. A. 1854, s. 34, *ante*, p. 240), to prevent error being brought, before the first step towards it can be made to appear to him to be *desirable*.

16. The proceeding upon such case shall, as nearly as may be, be the same as upon a special case stated under "The Common Law Procedure Act, 1852;"* and error may be brought upon a judgment upon such case; and the provisions of "The Common Law Procedure Act, 1854,"† as to bringing error upon a special case, shall apply to the proceedings in error upon a special case under this act.

Proceedings on special case in court below and in error.

* Sects. 46—48 (*ante*, pp. 50, 51). † Sect. 32 (*ante*, p. 238).

Judgment and decision, when to be final.

17. The judgment in any such action or issue as may be directed by the court or judge in any interpleader proceedings, and the decision of the court or judge in a summary manner, shall be final and conclusive against the parties and all persons claiming by, from, or under them.

This section is taken literally from 1 & 2 Will. 4, c. 58, s. 2 (*ante*, p. 232).

As to the finality of a summary decision, when made by consent of both parties, see *Shortridge* v. *Young* (12 M. & W. 5).

Rules, orders, &c. made in interpleader proceedings may be entered of record and made evidence.

18. All rules, orders, matters, and decisions to be made and done in interpleader proceedings under this act (excepting only any affidavits) may, together with the declaration in the cause, if any, be entered of record, with a note in the margin expressing the true date of such entry, to the end that the same may be evidence in future times, if required, and to secure and enforce the payment of costs directed by any such rule or order; and every such rule or order so entered shall have the force and effect of a judgment in the superior courts of common law.

This section repeats the earlier portion of 1 & 2 Will. 4, c. 58, s. 7, *ante*, p. 303; and omits so much as excepted a rule or order in interpleader from becoming, by registration, a charge upon land. The execution and registration of a writ of execution upon a judgment being now (27 & 28 Vict. c. 112, ss. 1, 3, *post*) requisite to constitute a charge upon land: the omission of that exception leaves the effect of 1 & 2 Will. 4, c. 58, s. 7, and of the present section, exactly the same as against *bonâ fide* purchasers and mortgagees, whether with or without notice.

It also omits the provisions of the earlier enactment as to writs of execution; and the result of this omission may be, that when the rule or order is based exclusively upon the provisions of *this* act, the execution for costs may issue forthwith, instead of being delayed until the expiration of fifteen days after notice of the taxation and amount.

This section does not supersede proceedings by attachment; or by execution under 1 & 2 Vict. c. 110, s. 18* (*Cetti* v. *Bartlett*, 9 M. & W. 840).

County Courts Act, 1867, *s.* 31.

Where a summons in the nature of interpleader has been issued under "The County Courts Act, 1867" (30 & 31 Vict. c. 142), s. 31, any action which shall have been brought in any Court in respect of the claim in such summons or of any damage arising out of the execution of the process shall be stayed.

Decrees and orders of courts of equity, &c. to have effect of judgments.

* And be it enacted, that all decrees and orders of courts of equity, and all rules of courts of common law, and all orders of the lord chancellor or of the court of review in matters of bankruptcy, and all orders of the lord chancellor in matters of lunacy, whereby any sum of money or any costs, charges or expenses, shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the persons to whom any such moneys or costs, charges, or expenses shall be payable, shall be

MISJOINDER OF PLAINTIFFS.

Joinder as plaintiffs of all persons supposed to be legally entitled.

19. The joinder of too many plaintiffs shall not be fatal,* but every action may be brought in the name of all the persons in whom the legal right may be supposed to exist; and judgment may be given in favour of the plaintiffs by whom the action is brought, or of one or more of them, or, in case of any question of misjoinder being raised, then in favour of such one or more of them as shall be adjudged by the court to be entitled to recover: provided always, that the defendant, though unsuccessful, shall be entitled to his costs occasioned by joining any person or persons in whose favour judgment is not given, unless otherwise ordered by the court or a judge.

See INTRODUCTION.

This is a very valuable enactment, see C. L. P. A. 1852, s. 34, n. (*ante*, p. 38, *et seq.*). It adopts a principle previously recognized in ejectment (see form of writ given in C. L. P. A. 1852, Sched. A., No. 13, *ante*, p. 192). The proviso as to extra costs *needlessly* occasioned to an unsuccessful defendant, and the provisions of ss. 20, 21, *infra*, prevent any hardship.

In an action by churchwardens, where some of the plaintiffs were disqualified from suing the court under this section, gave judgment for the plaintiffs not so disqualified (*Bremner* v. *Hall*, L. R. 1 C. P. 748).

Defendant to have benefit of set-off, though some plaintiffs improperly joined.

20. Upon the trial of such cause a defendant who has therein pleaded a set-off may obtain the benefit of his set-off by proving either that all the parties named as plaintiffs are indebted to him, notwithstanding that one or more of such plaintiffs was or were improperly joined, or on proving that the plaintiff or plaintiffs who establish their right to maintain the cause is or are indebted to him.

In the former case a defendant will obtain, against persons who are jointly indebted to him, the benefit of set-off, in actions wherein he could not have such benefit, but for the plaintiff, really interested in the action, having misjoined co-plaintiffs, and thus lost, as against the defendant, the opportunity of enforcing his several claim.

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deemed judgment creditors within the meaning of this act, and all powers hereby given to the judges of the superior courts of common law with respect to matters depending in the same courts, shall and may be exercised by courts of equity with respect to matters therein depending, and by the lord chancellor and the court of review in matters of bankruptcy, and by the lord chancellor in matters of lunacy, and all remedies hereby given to judgment creditors are in like manner given to persons to whom any moneys or costs, charges or expenses, are by such orders or rules respectively directed to be paid.

* Unless such misjoinder be inconsistent with the cause of action as alleged (*Bellingham* v. *Clarke*, 1 B. & S. 332); and see *Stubs* v. *Stubs* (1 H. & C. 257; L. J. 31, Ex. 510).

In the latter case the old right of set-off is protected against any misapplication of the previous section.

No other action for same claim to be brought.

21. No other action shall be brought against the defendant by any person so joined as plaintiff in respect of the same cause of action.

A previous judgment recovered in one of the superior courts by the same plaintiff against the same defendant, upon the same cause of action, has always been a good plea in bar (*Florence* v. *Jennings*, 1 C. B. N. S. 584); and see as to the effect of a judgment recovered in the consular court at Constantinople, and satisfied, *Barber* v. *Lamb* (8 C. B. N. S. 95; L. J. 29, C. P. 234). The pendency of such an action in one of our Superior Courts, furnished material for a good plea in abatement in the second (*Harley* v. *Greenwood*, 5 B. & A. 101); but see as to pendency of an action in a foreign court, *Cox* v. *Mitchell* (7 C. B. N. S. 55; L. J. 29, C. P. 33). The present enactment is directed against a claim being first shaped as joint, and then as several, and so tried on against a defendant either concurrently or consecutively; which course might, since the improvement introduced by s. 19 (*ante*, p. 313), be tantamount to a new trial at the discretion of an unsuccessful plaintiff.

Replevin.

Provisions of 19 & 20 Vict. c. 108, as to replevin extended to all cases of re-replevin.

22. The provisions of an act passed in the session of parliament held in the nineteenth and twentieth years of the reign of her present Majesty, chapter one hundred and eight, which relate to replevin, shall be deemed and taken to apply to all cases of replevin, in like manner as to the cases of replevin of goods distrained for rent or damage feasant.

This is intended to remove certain doubts referred to in the Common Law Commissioners' Third Report, p. 7.

19 & 20 Vict. c. 108.

The provisions of the 19 & 20 Vict. c. 108, which are thus explained, are as follow:—

Sect. 63. Registrar to grant replevin.

Sec. 63. The powers and responsibilities of the sheriff with respect to replevin bonds and replevins shall henceforth cease; and the registrar of the county court of the district in which any distress subject to replevin shall be taken shall be empowered, subject to the regulations hereinafter contained, to approve of replevin bonds, and to grant replevins, and to issue all necessary process in relation thereto, and such process shall be executed by the high bailiff.

Warrant to replevy.

Form 98.

Sect. 64. Replevins to be granted on securities given.

Sec. 64. Such registrar shall, at the instance of the party whose goods shall have been distrained, cause the same to be replevied to such party, on his giving one or other of such securities as are mentioned in the next two succeeding sections.

Sect. 65. Replevins may be commenced in superior courts.

Sec. 65. An action of replevin may be commenced in any superior court in the form applicable to personal actions therein, and such court shall have power to hear and determine the same; and if the replevisor shall wish to commence proceedings in any superior court, he shall, at the time of replevying, give security, to be approved of by the registrar, for such an amount as such

registrar shall deem sufficient to cover the alleged rent or damage in respect of which the distress shall have been made, and the probable costs of the cause in a superior court, conditioned to commence an action of replevin against the distrainor in such superior court as shall be named in the security, within one week from the date thereof, and to prosecute such action with effect and without delay, and unless judgment thereon be obtained by default, to prove before such superior court that he had good ground for believing either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair, or franchise, was in question, or that such rent or damage exceeded twenty pounds, and to make return of the goods, if a return thereof shall be adjudged.

Conditions of security to be given in such cases.

Sect. 66. Conditions of security to be given when replevin brought in county court.

Sec. 66. If the replevisor shall wish to commence proceedings in a county court, he shall at the time of replevying give security to be approved of by the registrar, for such an amount as such registrar shall deem sufficient to cover the alleged rent or damage in respect of which the distress shall have been made, and the probable costs of the cause in the county court, conditioned to commence an action of replevin against the distrainor in the county court of the district in which the distress shall have been taken, within one month from the date of the security, and to prosecute such action with effect and without delay, and to make return of the goods, if a return thereof shall be adjudged.

Sect. 67. Replevins shall, at instance of defendant, be removed into superior courts by certiorari in certain cases.

Sec. 67. Any action of replevin brought in a county court shall be removed into any superior court by writ of *certiorari*, if the defendant shall apply to such superior court or to a judge thereof for such writ, and shall give security, to be approved of by the master of such superior court, for such amount, not exceeding one hundred and fifty pounds, as such master shall think fit, conditioned to defend such action with effect, and, unless the replevisor shall discontinue or shall not prosecute such action, or become nonsuit therein, to prove before such superior court that the defendant had good ground for believing, either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair, or franchise, was in question, or that the rent or damage in respect of which the distress shall have been taken exceeded twenty pounds; and every such superior court shall have power to determine the same action.

Sect. 71. Where security is required to be given, a deposit of money may be made in lieu thereof.

Sec. 71. Where by this act, or any acts relating to the county courts, a party is required to give security, he may in lieu thereof deposit with the registrar, if the security is required to be given in a county court, or with a master of the superior court if the security is required to be given in such court, a sum equal in amount to the sum for which he would be required to give security, together with a memorandum, to be approved of by such registrar or master, and to be signed by such party, his attorney or agent, setting forth the conditions on which such money is deposited, and the registrar or master shall give to the party paying a written acknowledgment of such payment; and the judge of the county court, when the money shall have been deposited in such court, or a judge of the superior court, when the money shall have been deposited in a superior court, may, on the same evidence as would be required to enforce or avoid such bond as in the last preceding section is mentioned, order such sum so deposited to be paid out to such party or parties as to him shall seem just.

The county court has jurisdiction in replevin, even though

the title to land is in question (*Reg.* v. *Gurdon*, 12 W. R. 201, Q. B. M. T. 1863).

The provisions of the C. L. P. A. 1852, s. 41 (*ante*, p. 48), as to not joining any other cause of action with replevin, continues in force.

Payment into court in replevin.

23. The plaintiff in replevin may in answer to an avowry pay money into court in satisfaction, in like manner and subject to the same proceedings as to costs and otherwise as upon a payment into court by a defendant in other actions.

The following extract from the Third Report of the Common Law Commissioners, p. 7, very clearly explains the bearing of this, and the following section:—"Besides, this, there is an alteration in the procedure of replevin which would be especially beneficial in the case of distress for damage feasant. At present a tender, after impounding, of the rent or damage, is too late (*Singleton* v. *Williamson*, 7 H. & N. 747; L. J. 31, Ex. 287); and it is said that the distrainee's only course is to replevy, to let the jury find the rent or damage, and then to pay it. This is obviously most objectionable, as it involves the expense of trial at the cost of the distrainee, if the distrainor is obstinate or malicious, to ascertain a sum, the amount of which may not be doubtful, or which and much more the distrainee would pay rather than be at the expense of a trial. The remedy for this is to permit a plaintiff, in answer to an avowry, to pay money into court in satisfaction of the matter avowed for, and we recommend that this should be allowed. It would be necessary to alter the bonds of each party accordingly. If the distrainee paid in enough, and the action went on, then his case should be like that of a defendant now in ordinary actions, and the case of the defendant like that of the plaintiff in such an action, with similar results, mutatis mutandis, if too little was paid in."

See as to payment into court generally, C. L. P. A. 1852, ss. 70—73, and notes (*ante*, pp. 70—76).

Effect of such payment.

24. Such payment into court in replevin shall not, nor shall the acceptance thereof by the defendant in satisfaction, work a forfeiture of the replevin bond.

See note to previous section.

It might possibly have been argued that but for this section, the partial success obtained by the defendant, in consequence of the plaintiff's paying into court even a small portion of the sum distrained for, would have entitled the defendant, according to the strict letter of the bond, to recover upon it; *sed quære*.

See as to the condition of replevin bonds, 19 & 20 Vict. c. 108, ss. 65, 66, in note to s. 22 (*ante*, p. 315).

Payment into Court upon Bonds and in Detinue.

Payment into court in action on

25. In any action brought upon a bond which has a condition or defeasance to make void the same upon

payment of a lesser sum at a day or place certain, with a penalty, and in any action for detaining the goods of the plaintiff, it shall be lawful for the defendant, by leave of the court or a judge, and upon such terms as they or he shall think fit, to pay into court a sum of money to answer the claim of the plaintiff in respect of such bond in the former case, and in the latter case to the value of the goods alleged to be detained; and such payment into court shall be made and pleaded in like manner, and according to the provisions of "The Common Law Procedure Act, 1852;" and the like proceedings may be had and taken thereupon as to costs and otherwise.

money bonds, and for detainer.

Formerly money could not be paid into court in detinue (*Allan* v. *Dunn*, 1 H. & N. 572).

See the C. L. P. A. 1852, ss. 70—73 (*ante*, pp. 70—76); and the C. L. P. A. 1854, s. 78, n. (*ante*, p. 274); but it must be observed that "the leave of the court or a judge" is necessary for a defendant to be allowed to avail himself of it.

REAL ACTIONS.

26. No writ of right of dower or writ of dower *unde nihil habet*, and no plaint for freebench or dower in the nature of any such writ, and no *quare impedit*, shall be brought after the commencement of this act in any court whatsoever; but where any such writ, action, or plaint would now lie, either in a superior or in any other court, an action may be commenced by writ of summons issuing out of the Court of Common Pleas in the same manner and form as the writ of summons in an ordinary action; and upon such writ shall be indorsed a notice that the plaintiff intends to declare in dower, or for freebench, or in *quare impedit*, as the case may be.

Dower, writ of right of dower, and *quare impedit* abolished as real actions, and to be commenced by writ of summons.

This completely remodels those vestiges of the old real actions which survived the 3 & 4 Will. 4, c. 27, s. 36. The actions of dower, and for *freebench* had become almost obsolete in practice, in consequence of dower being generally barred either by settlement or conveyance; and because where the right to it does exist, equity often supplied a more convenient remedy than the old *original writs* out of Chancery. *Quare impedit* has retained much of its ancient importance; and was, notwithstanding its peculiar procedure, not unfrequently used.

Upon the old practice, see 1 Blackst. Com. vol. iii. c. 10, and App. 1. See pleadings in dower under the new practice in *Woodward* v. *Dowse* (10 C. B. N. S. 722; L. J. 31, C. P. 70).

The jurisdiction is still confined to the Common Pleas.

The nature of the claim intended to be made in the declaration, is to be indorsed upon the writ; but, in all other respects, the

writ will be in the common form of an unindorsed writ; and may be proceeded upon in like manner as in an ordinary action. The indorsed notice may be as follows:—"Take notice that the plaintiff intends to declare in Dower [*or* 'for Freebench,' *or* 'in *Quare Impedit*.']."

Semble, the absence of the indorsement upon a writ issued out of the Common Pleas, and followed by a declaration for a cause of real action, will be a mere irregularity; and, if no prejudice be caused to the defendant, will only entitle him to have the writ and copy amended at some trifling cost to the plaintiff.

Local Courts. It would seem that this section abolishes all jurisdiction hitherto exercised by local courts; such as the *Court of Common Pleas* of the County Palatine of Lancaster, the *Court of Pleas* of the County Palatine of Durham and Sadberge (Com. Dig., Franchises (D.), the *Court of Hustings** in London (Com. Dig., Courts (O. 1)), and others (Com. Dig., Courts (P.)); in such real actions as survived the 3 & 4 Will. 4, c. 27, s. 36; but it does not abolish *quare impedit* when brought by the Crown in the Queen's Bench.

Writ, and all proceedings thereupon, to be same as in ordinary actions.

27. The service of the writ, appearance of the defendant, proceedings in default of appearance, pleadings, judgment, execution, and all other proceedings and costs upon such writ, shall be subject to the same rules and practice, as nearly as may be, as the proceedings in an ordinary action commenced by writ of summons; and the provisions of "The Common Law Procedure Act, 1852," and of "The Common Law Procedure Act, 1854," shall apply to the writ and pleadings, and proceedings thereupon.

The effect of this section is to assimilate, in all respects, the proceedings in real and personal actions, so far as their respective objects permit; thus, although equitable defences would seem, by the latter portion of this section, to be pleadable in an action of dower or *quare impedit*, it would scarcely seem reasonable that payment of money into court should be allowed.

Attachment of Debts.

Judge may refuse to interfere in proceedings to attach debts.

28. In proceedings to obtain an attachment of debts under "The Common Law Procedure Act, 1854," the judge may, in his discretion, refuse to interfere, where, from the smallness of the amount to be recovered, or of the debt sought to be attached, or otherwise, the remedy sought would be worthless or vexatious.

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* The jurisdiction of this court as to "Pleas of Land" is abolished by the above section; its jurisdiction as to "Common Pleas" has long been obsolete except in Replevin, over which it retains, within the City of London, exclusive jurisdiction, notwithstanding the 19 & 20 Vict. c. 108, s. 63 (ante, p. 314); see also 15 & 16 Vict. c. lxxvii. s. 37. See Kerr's Edition of Blackstone's Commentaries, vol. iii. Appendix.

See C. L. P. A. 1854, ss. 60—67 (*ante*, pp. 264—270).

"An amendment has been suggested by our experience of the working of the Common Law Procedure Act, 1854, in relation to the attachment of debts. It is, that the judge should have a discretion to refuse to interfere in cases where the costs of the proceedings will, in his opinion, bear so large a proportion to the amount to be recovered as to make the remedy practically worthless or vexatious.

"There is a further provision which it is desirable to add to this part of the law. It occasionally happens, that the garnishee appears, admits the debt, is willing to pay it, but has a *bonâ fide* doubt whether the execution debtor is really entitled to it, and whether some other person is not. Now, it is obvious, that garnishees ought not to be compelled to pay without being protected against that other person, and that the latter ought not to have his rights decided on without an opportunity of being heard on them. To prevent these inconveniences, the proper remedy is, that the garnishee, on being served with the order, should be at liberty to take out a summons, in the nature of an interpleader summons, calling on any person, to whom he suggests the debt is really due, to appear. Proceedings might then take place, as on interpleader summonses, and the creditor, or person called on, be barred according to the result.

"Doubts also exist as to whether a judge can exercise a discretionary power in cases where the garnishee appears and admits the debt in point of law, and where the judgment debtor has, in strictness, a legal right to maintain an action against the garnishee: but, under the circumstances, it would, in the opinion of the judge, be inequitable for him to do so. For instance, where the garnishee has a cross claim against the judgment debtor for an amount exceeding the judgment debtor's claim, but which is not yet due. In such case it may well be, that the judgment debtor himself would not think of enforcing payment of the debt due to him from the garnishee, whilst his assignees in bankruptcy or insolvency could not do so. To meet such cases, the judge should have power to make such order as shall, in his opinion, effect complete justice between all the parties."—(*Third Report of Common Law Commissioners*, 1850, p. 7.)

Proceedings where third person has a lien on the debt.

29. Whenever in proceedings to obtain an attachment of debts under the act above mentioned it is suggested by the garnishee that the debt sought to be attached belongs to some third person who has a lien or charge upon it, the judge may order such third person to appear before him, and state the nature and particulars of his claim upon such debt.

See s. 28, and note, *supra*.

Judge may bar claim of third person, and make orders.

30. After hearing the allegations of such third person under such order, and of any other person whom by the same or any subsequent order the judge may think fit to call before him, or in case of such third person not appearing before him upon such summons,

the judge may order execution to issue to levy the amount due from such garnishee, or the judgment creditor to proceed against the garnishee, according to the provisions of "The Common Law Procedure Act, 1854," and he may bar the claim of such third person, or make such other order as he shall think fit, upon such terms, in all cases, with respect to the lien or charge (if any) of such third person, and to costs, as he shall think just and reasonable.

This enactment is somewhat analogous to the proceedings in interpleader introduced, s. 13 (*ante*, p. 310).

It provides for a summary adjudication by the judge upon the claims of a third party to liens or charges upon debts, sought to be attached by an execution creditor; and gives a power of *barring such claims*, i. e. claims to such *liens* or *charges*, as between such third person and the garnishee; but not of barring a debt claimed by such third person against the execution debtor. For an instance of the application of this section see *Mitchell* v. *Les* (L.R. 2 Q. B. 259).

See s. 28 and note (*ante*, p. 319).

Provisions of 17 & 18 Vict. c. 125, to apply to orders.

31. The provisions of "The Common Law Procedure Act, 1854," so far as they are applicable, shall apply to any order, and the proceedings thereon, made and taken in pursuance of the herein next before-mentioned powers under this act.

See C. L. P. A. 1854, ss. 46—49, 55—57, 60—67 (*ante*, pp. 245—249, 262—270).

This section is applicable only to proceedings under ss. 29, 30, *supra*.

Mandamus and Injunction.

Costs of writ of *mandamus* and injunction may be included in writs.

32. In all cases in which a writ of *mandamus* or of injunction is issued under the provisions of "The Common Law Procedure Act, 1854,"* such writ shall, unless otherwise ordered by the court or a judge, in addition to the matter directed to be inserted therein, command the defendant to pay to the plaintiff the costs of preparing, issuing and serving such writ; and payment of such costs may be enforced in the same manner as costs payable under a rule of court are now by law enforceable.

Where the plaintiff in an action for a nuisance obtained an order for an injunction *ex parte* under C. L. P. A. 1854, s. 82 (*ante*, p. 277), which was silent as to costs, and the writ issued to restrain the nuisance, and also for the payment of costs under this section, it was held that the plaintiff ought not to be allowed to proceed

* *C. L. P. A.* 1854, *ss.* 72, 80 (*ante*, pp. 272, 276).

to recover the costs of the injunction before the trial (*Grindley* v. *Booth*, 3 H. & C. 669; L. J. 34, Ex. 135).

A rule of court is enforceable by attachment; and, in the case of rules for payment of money, by execution under 1 & 2 Vict. c. 110, s. 18; as to which see p. 312, n., *ante;* Ch. Pract. 12th ed. pt. vi.; and R. G. H. T. 1853, r. 168, *post*. *Semble*, that these writs are to have the effect of, and to be proceeded upon in the same manner as, rules of court.

Mode of enforcing writs of injunction against corporations.

33. Writs of injunction against a corporation may be enforced either by attachment against the directors or other officers thereof, as in the case of a *mandamus*, or by writ of sequestration against their property and effects, to be issued in such form and tested and returnable in like manner as writs of execution, and to be proceeded upon and executed in like manner as writs of sequestration issuing out of the Court of Chancery.

Attachment being a merely personal remedy, does not lie against a corporation aggregate (*Mackenzie* v. *Sligo Railway Company*, 9 C. B. 250).

The C. L. P. A. 1854, s. 73 (*ante*, p. 272), provided that obedience to a *mandamus* awarded in an action, might be enforced by attachment; this had been the practice upon *prerogative mandamus*, but it does not appear, otherwise than from the suggestion contained in this section, that a *mandamus* directed to a corporation aggregate, ever could, or now can be enforced by attachment against "the directors or other officers thereof," although such a vicarious punishment has been indeed provided by legislative wisdom in the particular case of disobedience to injunctions under "The Railway and Canal Traffic Act, 1854." The words "as in the case of a *mandamus*" may, however, be construed by the courts, as not *descriptive* of something pre-existing, but as *operative;* and it may thence be held that writs of injunction, and of *mandamus*, "against a corporation, may be enforced either by attachment against the directors or other officers thereof," or by writ of sequestration against *their* property and effects." This construction, though utterly ungrammatical, may further what would seem to be the intentions of the legislature; although the courts will more probably treat the words, "as in the case of a *mandamus*," as mere surplusage, and limit the operation of the section, in strict accordance with its marginal note.

Again, the property of the disobedient corporation is protected; while that of its directors and other officers, whether personally recalcitrant or not, is subjected to the new writ of sequestration; but as this writ is put in the same category as process of attachment, it fortunately cannot issue without leave; and the courts will no doubt exercise vigilance lest the persons and property of unoffending officials be needlessly victimized.

It is only right to add that this curious enactment is not based upon any recommendation of the Common Law Commissioners.

As to the proceedings upon, and the manner of executing, writs of sequestration in Chancery, see Dan. Ch. Pract. 4th ed. pp. 945—965.

Costs.

Costs not recoverable in action for injury, and verdict less than 5*l.*, if judge certifies.

Repealed by 30 & 31 *Vict. c.* 142, *s.* 33.

34. ***When the plaintiff in any action for an alleged wrong* in any of the Superior Courts recovers by the verdict of a jury† less than five pounds, he shall not be entitled to recover or obtain from the defendant any costs whatever in respect of such verdict, whether given upon any issue or issues tried, or judgment passed by default, in case the judge or presiding officer before whom such verdict is obtained shall immediately‡ afterwards certify on the back of the record, or on the writ of trial§ or writ of inquiry, that the action was not really brought to try a right besides the mere right to recover damages, and that the trespass or grievance in respect of which the action was brought was not wilful and malicious‖, and that the action was not fit to be brought.***

This section is repealed by the County Courts Act, 1867 (30 & 31 Vict. c. 142, s. 33), which came into operation on the 1st January, 1868; that act contains fresh and more stringent enactments as to costs, *vide infra*.

This section extended the operation of 3 & 4 Vict. c. 24, s. 2, from 40*s.* to 5*l.*; and further provided that the certificate of the judge or other presiding officer should state "that the action was not fit to be brought;" but this unfitness must be taken conjunctively with the other conditions, and would not *alone* support a certificate (*Gooding* v. *Britnall*, 11 C. B. N. S. 148; L. J. 31, C. P. 5); but the omission from the certificate of the words "wilful and" has been held not to vitiate the certificate (*Saunders* v. *Kirwan*, 10 C. B. N. S. 514; L. J. 30, C. P. 351).

See as to costs generally, Chitty's Statutes, vol. i. p. 1099, *et seq.*; Chit. Prac. 12th ed. vol. i., pp. 468—522; and Gray on Costs.

This section has been held applicable in actions commenced prior to the passing of this act, upon the ground of distinction between *rights*, and the incidents of the *procedure* to enforce them (*Wright* v. *Hale*, 6 H. & N. 227; L. J. 30, Ex. 40). See cases as to retroactive effect of statutes, collected in note to s. 2 (*ante*, pp. 297, 298).

It may be well to add here, that a jury at the trial of a cause

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* Actions of detinue were not within this section (*Danby* v. *Lamb*, 11 C. B. N. S. 423; L. J. 31, C. P. 17).

† These words distinguish this from such enactments as 43 Geo. 3, c. 46, s. 3 (*Brooks* v. *Rigby*, 2 A. & E. 21); and 13 & 14 Vict. c. 61, s. 11 (*Chambers* v. *Wiles*, L. J. 24, Q. B. (Bail Court) 267).

‡ See *Chaplin* v. *Levy*, 9 Ex. 531; L. J. 23, Ex. 209: see also *Skipper* v. *Bodkin*, L. J. 29, P. & M. 133; more fully reported, 8 W. R. 589; but the time may be extended by the implied consent of the defendant (*Hedon* v. *Atlantic Royal Mail Steam Navigation Company*, 2 E. & E. 671; L. J. 29, Q. B. 191).

§ It does not appear how this section could apply in those cases in which alone writs of trial were issued, *i. e.* claims for liquidated damages *ex contractu*.

‖ Therefore in an action for libel or slander, or malicious prosecution, or illegal arrest, the judge could not certify under this section.

have no right, in estimating damages, to take into their consideration what amount will carry costs, and if it appears that they were thereby influenced in their finding, it is ground for granting a new trial (*Poole* v. *Whitcombe*, 12 C. B. N. S. 770); but see *Wakelin* v. *Morris* (2 F. & F. 26) cor. Erle, C. J.

"With respect to the subject of costs, it appears to us that the two objects to be attained are, that the right to costs should be clearly defined, and that the amount to be awarded should be uniform in all the courts.

"The statutes which give to the parties a right to costs are in a very confused and unsatisfactory state. Not only have the separate enactments of the older statutes given rise to a variety of decisions, but subsequent statutes have in some instances modified, and in others partially repealed, former enactments, so that it is extremely difficult to ascertain what the real state of the law is on this subject.

"We are of opinion that these statutes should be revised and consolidated. All that we think it necessary to say upon this branch of the subject is, that the leading principles which now regulate the right to costs should be retained. The party succeeding in the suit should have the general costs of the cause; the party succeeding on issues, either of law or fact, although he be not entitled to the general costs of the cause, should have the costs of those issues, or of those parts of the cause on which he succeeds; and the restraints now imposed on frivolous actions, by depriving the party of costs, should be preserved, and better defined than they are at present. Under this head we think that it ought to be enacted, that whenever a plaintiff in any action recovers less than *5l.* damages, it should be in the discretion of the judge to allow or disallow his costs."—(*Third Report of Common Law Commissioners*, 1850, p. 7.)

The law of costs has recently been very much simplified by the County Courts Act, 1867 (Stat. 30 & 31 Vict. c. 142) above mentioned, which by section 33, repeals this section, together with a number of enactments relating to costs, including those which gave concurrent jurisdiction in certain cases to the Superior Courts, contained in the several previous County Court Acts, and in lieu thereof contains (sec. 5), the following provisions:— *30 & 31 Vict. c. 142.*

"If in any action commenced after the passing of this act in any of her Majesty's Superior Courts of Record the plaintiff shall recover a sum not exceeding 20*l.* if the action is founded on contract, or 10*l.* if founded on tort, whether by verdict, judgment by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit unless the judge certify on the record that there was sufficient reason for bringing such action in such superior court, or unless the court or a judge at chambers shall by rule or order allow such costs." *Sect. 5.*

The Court of Common Pleas held that this section did not apply in the case of a judgment recovered before the day on which the act (by s. 33) came into operation (*Wood* v. *Riley*, L. R. 3, C. P. 26).

As to whether detinue is an action founded on contract or tort, see *Danby* v. *Lamb* (11 C. B. N. S. 423; L. J. 31, C. P. 17).

Sections 7 and 9 empower a judge in certain cases, to remit causes for trial to a county court, subject to the county court scale of costs; for these sections, see notes to R. G. H. T. 1853, rr. 34, 22 (*post*, pp. 361, 354). It would appear from the principle laid down in the cases above cited, that ss. 7 & 9 apply to actions commenced before the passing of the act.

The Merchant Shipping Act, 1854.

Enactment in lieu of s. 88 of 17 & 18 Vict. c. 125.

35. The eighty-eighth section of "The Common Law Procedure Act, 1854," shall be and is hereby repealed; and from and after the passing of this act the Superior Courts or any judge thereof may, upon summary application, by rule or order, exercise such and the like jurisdiction as may be exercised by the Court of Chancery under the provisions of the ninth part of "The Merchant Shipping Act, 1854."

This section is substituted for the very unfortunate legislative abortion "hereby repealed," as to which see C. L. P. A. 1854, s. 88, n. (*ante*, p. 286).

Amendments.

Amendments.

36. It shall be lawful for the Superior Courts of common law, and every judge thereof, and any judge sitting at *nisi prius*, at all times to amend all defects and errors in any proceedings under the provisions of this act, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit, and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made, if duly applied for.

This section is taken in terms from the C. L. P. A. 1854, s. 96 (*ante*, p. 290); and differs from the C. L. P. A. 1852, s. 222 (*ante*, p. 175), only in this, that its application is in terms limited to "proceedings under the provisions of this act;" and its operation conditioned upon due application being made.

New Rules and Forms.

General rules may be made by the judges.

37. It shall be lawful for the judges of the said courts, or any eight or more of them, of whom the chiefs of each of the said courts shall be three, from time to time to make all such general rules and orders for the effectual execution of this act and of the intention and object thereof, and for fixing the costs to be allowed for and in respect of the matters herein contained, and the performance thereof, as in their judgment shall be necessary or proper, and for that purpose to meet from time to time as occasion may

require; provided that nothing herein contained shall be construed to restrain the authority or limit the jurisdiction of the said courts or of the judges thereof to make rules or orders, or otherwise to regulate and dispose of the business therein.

This is the same as C. L. P. A. 1854, s. 97 (*ante*, p. 291).

New forms of writs and other proceedings.

38. Such new or altered writs and forms of proceedings may be issued, entered and taken as may by the judges of the said courts, or any eight or more of them, of whom the chiefs of each of the said courts shall be three, be deemed necessary or expedient for giving effect to the provisions hereinbefore contained, and in such forms as the judges of such courts respectively shall from time to time think fit to order; and such writs and proceedings shall be acted upon and enforced in such and the same manner as writs and proceedings of the said courts are now acted upon and enforced, or as near thereto as the circumstances of the case will admit; and any existing writ or proceeding the form of which shall be in any manner altered in pursuance of this act shall nevertheless be of the same force and virtue as if no alteration had been made therein, except as far as the effect thereof may be varied by this act.

This is in terms the same as C. L. P. A. 1854, s. 98 (*ante*, p. 291).

Interpretation of Terms.

Interpretation of terms.

39. In the construction of this act the word "court" shall be understood to mean any one of the Superior Courts of common law at *Westminster;* and the word "judge" shall be understood to mean a judge or baron of any of the said courts; and the word "master" shall be understood to mean a master of any of the said courts; and the word "action" shall be understood to mean any action in any of the said courts.

This section agrees in interpretation of terms with C. L. P. A. 1854, s. 99 (see note, p. 292, *ante*), except in its extension of the term "action" to actions other than "*personal*."

See also C. L. P. A. 1852, s. 227 (*ante*, p. 181), wherein "action" is limited to *personal actions brought by writ of summons*.

Counties Palatine.

Provisions relating to superior

40. All the enactments and provisions of this act shall extend and apply to the Court of Common Pleas

courts to apply to Court of Common Pleas at Lancaster and Court of Pleas at Durham.

at *Lancaster* and the Court of Pleas at *Durham*, and actions and proceedings therein respectively, subject to the following modifications: All the powers given by this act to the judges of the said Superior Courts of common law at *Westminster* to make general rules and orders shall and may be exercised by the respective judges of the Court of Common Pleas at *Lancaster* and Court of Pleas at *Durham*, being judges of one of the said common law courts at *Westminster*, or any two of them respectively, with respect to the said Court of Common Pleas at *Lancaster* and Court of Pleas at *Durham* respectively, and matters and proceedings therein within the jurisdiction of the same courts respectively; and all powers under this act exercisable by any one judge of the Superior Courts at *Westminster* shall and may be exercisable by one judge of the said Superior Courts of the said counties palatine, being also a judge of one of the said courts at *Westminster*, as to matters and proceedings in the said Superior Courts of the said counties palatine.

See C. L. P. A. 1852, ss. 229—231 (*ante*, pp. 182—184), and C. L. P. A. 1854, s. 100 (*ante*, p. 292).

Provisions as to masters of courts at Westminster to apply to prothonotaries of palatinate courts.

41. Provided always, that all the provisions of this act applicable to masters of the said courts at *Westminster* shall apply to the respective prothonotaries of the Court of Common Pleas at *Durham* and their respective deputies, who may singly exercise, with reference to matters and proceedings in the last-mentioned courts respectively, the powers hereby given to any one or more of the masters of the superior courts at *Westminster*.

See C. L. P. A. 1852, s. 232 (*ante*, p. 184), and C. L. P. A. 1854, s. 101 (*ante*, p. 293).

As to proceedings in appeal.

42. Provided also, as to proceedings in appeal, that the Court of Queen's Bench, being the Court of Error from the said Court of Common Pleas at *Lancaster* and Court of Pleas at *Durham*, shall also be the Court of Appeal from the said respective courts for the purposes of this act.

See C. L. P. A. 1852, s. 233 (*ante*, p. 185), and C. L. P. A. 1854, s. 102 (*ante*, p. 293).

COMMENCEMENT OF ACT.

Commencement of act.

43. The provisions of this act shall come into operation on the tenth day of *October*, in the year of our Lord one thousand eight hundred and sixty.

Her Majesty may direct all or part of this act to extend to any court of record.

44. It shall be lawful for her Majesty from time to time, by any order in council, to direct that all or any part of the provisions of this act, or of the rules to be made in pursuance thereof, shall apply to all or any Court or Courts of Record in *England* and *Wales*, and within one month after such order shall have been made and published in the *London Gazette* such provisions and rules respectively shall extend and apply in manner directed by such order, and any such order may be in like manner from time to time altered and annulled; and in and by any such order her Majesty may direct by whom any powers or duties incident to the provisions applied under this act shall and may be exercised with respect to matters in such court or courts, and may make any order or regulations which may be deemed requisite for carrying into operation in such court or courts the provisions so applied.

See C. L. P. A. 1852, s. 228 (*ante*, p. 182), and C. L. P. A. 1854, s. 105 (*ante*, p. 293).

Short title.

45. In citing this act in any instrument, document or proceeding, it shall be sufficient to use the expression "The Common Law Procedure Act, 1860."

Extent of act.

46. Nothing in this act shall extend to *Ireland* or *Scotland*.

THE SUMMARY PROCEDURE ON BILLS OF EXCHANGE ACT, 1855.*

(18 & 19 VICT. c. 67.)

An Act to facilitate the Remedies on Bills of Exchange and Promissory Notes by the Prevention of frivolous or fictitious Defences to Actions thereon. [23rd July, 1855.]

WHEREAS *bonâ fide* holders of dishonoured bills of exchange and promissory notes are often unjustly delayed and put to unnecessary expense in recovering the amount thereof by reason of frivolous or fictitious defences to actions thereon, and it is expedient that greater facilities than now exist should be given for the recovery of money due on such bills or notes: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by authority of the same, as follows:—

This preamble well sets forth the mischief intended to be remedied by this enactment; which has been so framed as to leave every reasonable opportunity to defendants, having bonâ fide defences, to set them up; while it deprives the ordinary class of defendants, in actions on bills of exchange and promissory notes, of the opportunities they formerly enjoyed of delaying their creditors and putting them to useless costs. It was urged upon the legislature to treat dishonoured bills as *quasi* judgments; but this foreign practice, which seems to be based upon no sound principle whatever, the legislature refused to adopt.

It would seem from the mischief contemplated by the act, and also from the terms in which the remedy is provided, that summary procedure under this act, does not lie *against* persons who are not actual *parties to the instrument*, but who have become liable thereon indirectly, either by representation, as in the case of executors and administrators; or by marriage; see *Leigh and wife, executor, &c.* v. *Baker, executrix, &c.* (2 C. B. N. S. 367); and *Marriage* v. *Skiggs* (4 D. G. & J. 4; L. J. 28, Ch. 433): but it seems to be quite immaterial whether the *holder* is entitled in a representative character, or otherwise.

* This act is generally known as "*Sir H. S. Keating's Act.*"

From Oct. 24, 1855, all actions upon bills of exchange, &c. may be by writ of summons, as Form in Schedule A. Plaintiff, on filing affidavit of personal service, may at once sign final judgment, as Form in Schedule B.

1. From and after the twenty-fourth day of *October*, one thousand eight hundred and fifty-five, all actions upon bills of exchange or promissory notes commenced within six months after the same shall have become due and payable may be by writ of summons in the special form contained in schedule A. to this act annexed, and indorsed as therein mentioned; and it shall be lawful for the plaintiff, on filing an affidavit of personal service of such writ within the jurisdiction of the court, or an order for leave to proceed, as provided by the "Common Law Procedure Act, 1852,"* and a copy of the writ of summons and the indorsements† thereon, in case the defendant shall not have obtained leave to appear and have appeared to such writ according to the exigency thereof,‡ at once to sign final judgment in the form contained in schedule B. to this act annexed (on which judgment no proceeding in error shall lie) for any sum not exceeding the sum indorsed on the writ, together with interest, at the rate specified (if any), to the date of the judgment, and a sum for costs to be fixed by the masters § of the superior courts or any three of them, subject to the approval of the judges thereof or any eight of them (of whom the lord chief justices and the lord chief baron shall be three), unless the plaintiff claim more than such fixed sum; in which case the costs shall be taxed in the ordinary way, and the plaintiff may upon such judgment issue execution forthwith.

A *cheque upon a banker* has been held to be a *bill of exchange*, within the scope of this enactment (*Eyre* v. *Waller*, 5 H. & N. 460; L. J. 29, Ex. 246); and see *Keene* v. *Beard* (8 C. B. N. S. 272).

In the case of a note payable on demand, the six months begin to run immediately upon the making; but where a writ is issued after that period, the proceedings are not a nullity, but merely

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* Sect. 17 (*ante*, p. 11).

† See as to indorsement s. 5, n., and R. G., 26 Nov. 1855, *post*.

‡ It has been held that Sunday is not to be included in days for appearance, if it is the last day (*Lewis* v. *Calor*, 1 F. & F. 306, Erle, J.); which case agrees with *Mumford* v. *Hitchcocks* (14 C. B. N. S. 361; L. J. 32, C. P. 168); and see R. G. H. T. 1853, r. 174, note, *post*.

§ *Friday, Nov.* 2, 1855.

In pursuance of "The Summary Procedure on Bills of Exchange Act, 1855," the masters of the superior courts of common law have fixed, with the approval of the judges, the following sums for costs to be allowed in cases in which the plaintiff has signed final judgment for default of appearance, viz.:—

Above £20		
Agency on country cases, including mileage	£4	0
Town cases	3	8
Under £20		
Agency on country cases, including mileage	£3	2
Town cases	2	14

irregular; and the defendant may, by his conduct, deprive himself of the right to object (*Maltby* v. *Murrell*, 5 H. & N. 813); or the proceedings may be amended upon such terms as the court may think fit, under s. 7 (*post*, p. 332), even after judgment and execution, so as to put the parties in the same position as though the action had been commenced upon an ordinary writ (*Leigh* v. *Baker*, 2 C. B. N. S. 367).

It may well be doubted if error will lie upon a writ wrongly issued under this section, even though the defect appears on the proceedings, for the section appears to preclude this remedy; in *Hodsoll* v. *Baxter* (*in error*, E. B. & E. 884; L. J. 28, Q. B. 61), judgment was signed under the C. L. P. A. 1852, s. 27 (*ante*, pp. 32, 33), which is similar in terms to the present one, but the attention of the Court does not appear in that case to have been directed to the terms of the section.

Interest. In practice, it is not unusual to indorse, as claimed for interest, a sum sufficient to cover all interest that may accrue up to the judgment; *i. e.*, the expiration of the twelve days when judgment may be signed; and having regard to the form of the notice on the writ given by Schedule A. (*post*, p. 334), it would seem that this course is necessary in order to enable the plaintiff to obtain the interest allowed to be recovered by this section.

See as to the rate of interest recoverable, *Keene* v. *Keene* (3 C. B. N. S. 144).

The costs for which judgment may be signed, have been regulated by the Rule of 2nd November, 1855 (*ante*, p. 329, n.).

Costs. The costs, and also the expense of noting (s. 5, *post*, p. 331), may be claimed by the indorsement upon the writ. Compare the form of indorsement in Sched. A. to this act, with the form provided by R. G. 26th November, 1855, *post*: and as to practice before this rule, see *Robinson* v. *Cotterell* and *Hall* v. *Coates* (11 Exch. 476).

County Courts Acts. It was held that on a judgment by default recovered under this section for less than 20*l.*, the plaintiff was, notwithstanding the County Courts Acts, entitled to his costs by the terms of the section. This apparent oversight was corrected by the 19 & 20 Vict. c. 108, s. 4, which deprived plaintiffs of costs in such cases where the sum recovered was less than 20*l.* The last-mentioned act, however, did not extend to the City of London Small Debts Court, and therefore neither that act nor the 15 & 16 Vict. c. lxxii. ss. 119, 120, deprived of his costs a plaintiff who recovered by default under the above section, a sum less than 20*l.* within the city courts jurisdiction (*Healey* v. *Johns*, 8 E. & B. 946; L. J. 27, Q. B. 183); but where the defendant was let in to defend, and the plaintiff recovered less than 20*l.*, the plaintiff got no costs (*Harris* v. *Swinburn*, 5 B. & S. 370; L. J. 33, Q. B. 313). The County Courts Act, 1867 (30 & 31 Vict. c. 142) has now, by s. 35, practically abolished this distinction between the County Courts and the City of London Court; s. 33 of that act repeals the stat. 15 & 16 Vict. c. lxxii. ss. 118, 119, above cited; and s. 5 (cited *ante*, p. 323) applies to all judgments, including those by default.

Defendant showing a defence upon the merits to have leave to appear.

2. A judge of any of the said courts shall, upon application within the period of twelve days from such service, give leave to appear to such writ, and to defend the action, on the defendant paying into court the sum indorsed on the writ, or upon affidavits satis-

factory to the judge, which disclose a legal or equitable defence, or such facts as would make it incumbent on the holder to prove consideration, or such other facts as the judge may deem sufficient to support the application, and on such terms as to security or otherwise as to the judge may seem fit.

Leave to appear should be applied for *ex parte*; and, in the first instance, at chambers (*Fitch* v. *Glover*, 26 L. T. 59, Q. B. M. T. 1855); see also *Smith* v. *Dive* (6 Jur. N. S. 1016, C. P. E. T. 1860); but upon an application within the twelve days from service of the writ, and upon payment into court of the sum indorsed upon it, a defendant is entitled to leave to appear, as of right.

Where the application is rested upon affidavit, leave will be granted when some plausible ground for supposing there may be a substantial defence is disclosed (*Clay* v. *Turley*, L. J. 27, Ex. 2; *Mathews* v. *Marsland*, L. J. 27, Ex. 148; *Esdaile* v. *Ramsay*, 10 W. R. 20, Ex. M. T. 1861; *Frebout* v. *Stevens*, L. J. 30, Ex. 1; *Agra & Masterman's Bank* v. *Leighton*, L. R. 2 Ex. 56).

Where leave has been granted, the plaintiff may, upon summons, apply to rescind the order (*Sherwood* v. *Hare*, 1 F. & F. 379); see, in the case of an order fraudulently obtained, *Pollock* v. *Turnock*, 1 H. & N. 741); but if there is a *bonâ fide* conflict of testimony, the order, in accordance with the uniform practice in interlocutory proceedings that may in due course be tried by a jury, will not be disturbed (*Brutton* v. *Thomas*, 1 F. & F. 377; see also *Frebout* v. *Stevens*, and *Agra & Masterman's Bank* v. *Leighton*, *ubi supra*). An appeal lies to the court from a decision at chambers (*Mathews* v. *Marsland*, *ubi supra*), notwithstanding the doubt expressed in *Smith* v. *Dive* (*ubi supra*).

The defence at the trial is not limited to the grounds set out in the affidavit (*Saul* v. *Jones*, 1 E. & B. 591; L. J. 28, Q. B. 37).

As to the method of proving, at the trial, the affidavit the defendant has made under this section in order to obtain leave to appear, see *Barnes* v. *Parker* (15 L. T. N. S. 218, Ex. M. T. 1866, cited *ante*, p. 260).

Judge may, under special circumstances, set aside judgment.

3. After judgment, the court or a judge may, under special circumstances, set aside the judgment, and, if necessary, stay or set aside execution, and may give leave to appear to the writ, and to defend the action, if it shall appear to be reasonable to the court or judge so to do, and on such terms as to the court or judge may seem just.

See for an instance of the exercise of this power after execution executed, *Leigh* v. *Baker* (2 C. B. N. S. 367).

Judge may order bill to be deposited with officer of court in certain cases.

4. In any proceedings under this act it shall be competent to the court or a judge to order the bill or note sought to be proceeded upon to be forthwith deposited with an officer of the court, and further to order that all proceedings shall be stayed until the

plaintiff shall have given security for the costs thereof.

The former part of this section is of value in cases where bills have been forged or otherwise fraudulently obtained.

Remedy for the recovery of expenses of noting non-acceptance of dishonoured bill.

5. The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non-acceptance or non-payment, or otherwise by reason of such dishonour, as he has under this act for the recovery of the amount of such bill or note.

This section creates a right to recover notarial and other expenses as *liquidated* damages, where the proceedings are taken under this act. Formerly such expenses, when recoverable at all, could only be recovered as *unliquidated* and *special* damages (*Kendrick* v. *Lomax*, 2 C. & J. 407; *Rogers* v. *Hunt*, 10 Exch. 474): and it would seem that the law remains unaltered where the proceedings are not taken under this act (s. 1, *ante*, p. 328). As there can be no other occasion for having a bill *noted* or *protested* than to enforce payment of a foreign bill, it would seem that this enactment might well have been so limited as to prevent the expenses of employing notaries, where unnecessary, from being recovered. These expenses may be indorsed upon the writ (R. G., 26 November, 1855, *post*).

Holder of bill of exchange may issue one summons against all or any of the parties to the bill.

6. The holder of any bill of exchange or promissory note may, if he think fit, issue one writ of summons, according to this act, against all or any number of the parties to such bill or note, and such writ of summons shall be the commencement of an action or actions against the parties therein named respectively, and all subsequent proceedings against such respective parties shall be in like manner, so far as may be, as if separate writs of summons had been issued.

It is quite optional with a plaintiff to avail himself of this provision or not; and, while it therefore in no way fetters his rights against any of the parties, it enables him at the expense of one writ (the service of which, against any of the parties, he may delay as he thinks fit), to lay the foundation of an action against all.

Common Law Procedure Acts and rules incorporated with this act.

7. The provisions of the "Common Law Procedure Act, 1852," and the "Common Law Procedure Act, 1854," and all rules made under or by virtue of either of the said acts, shall, so far as the same are or may be made applicable, extend and apply to all proceedings to be had or taken under this act.

See the effect of this section copiously discussed in *Leigh* v. *Baker* (2 C. B. N. S. 367); see also amendments made in *Knight* v. *Pocock* (17 C. B. 177).

Act to apply to Courts of Common Pleas, Lancaster, and Durham.

8. The provisions of this act shall apply, as near as may be, to the Court of Common Pleas at *Lancaster* and the Court of Pleas at *Durham*, and the judges of such courts, being judges of one of the Superior Courts of common law at *Westminster*, shall have power to frame all rules and process necessary thereto.

Her Majesty may direct act to apply to courts of record in England and Wales.

9. It shall be lawful for her Majesty from time to time, by an order in council, to direct that all or any part of the provisions of this act shall apply to all or any court or courts of record in *England* and *Wales*, and within one month after such order shall have been made and published in the *London Gazette* such provisions shall extend and apply in manner directed by such order, and any such order may be, in like manner, from time to time altered and annulled, and in and by any such order her Majesty may direct by whom any powers or duties incident to the provisions applied under this act shall and may be exercised with respect to matters in such court or courts, and may make any orders or regulations which may be deemed requisite for carrying into operation in such court or courts the provisions so applied.

This act has been extended to the county courts under the powers given by this section, and rules have been framed under 19 & 20 Vict. c. 108, s. 5, for regulating the practice in such proceedings (County Court Rules, 188—192, see 26 L. J. Com. Law).

Rule 189 has been held not to limit the defence at the trial, to the grounds stated in the affidavit (*Saul* v. *Jones*, 1 E. & B. 591; L. J. 28, Q. B. 37); for the object of requiring matter of defence to be disclosed, where money is not brought into court, is not to give any advantage to the plaintiff, in a *bonâ fide* contested action; but to prevent his being delayed, when there is no *bonâ fide* defence at all.

Extent of act.

10. Nothing in this act shall extend to *Ireland* or *Scotland*.

Short title.

11. In citing this act in any instrument, document, or proceeding, it shall be sufficient to use the expression "The Summary Procedure on Bills of Exchange Act, 1855."

SCHEDULES referred to in the foregoing Act.

(A.)

VICTORIA, by the grace of God, *&c.*

To *C. D.*, of , in the county of .

We warn you, that unless within twelve days after the service of this writ on you, inclusive of the day of such service, you obtain leave from one of the judges of the courts at Westminster to appear, and do within that time appear in our court of , in an action at the suit of *A. B.*, the said *A. B.* may proceed therein to judgment and execution. Witness, *&c.*

Memorandum to be subscribed on the Writ.

N.B.—This writ is to be served within (*six*) calendar months from the date hereof, or, if renewed, from the date of such renewal, including the day of such date, and not afterwards.

Indorsement to be made on the Writ, before Service thereof.

This writ was issued by *E. F.*, of , attorney for the plaintiff, *or* this writ was issued in person by *A. B.*, who resides at [*mention the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence*].

*Indorsement.**

The plaintiff claims [pounds, principal and interest], *or* pounds balance of principal and interest due to him as the payee [*or* indorsee] of a bill of exchange or promissory note, of which the following is a copy:—

[*Here copy bill of exchange or promissory note, and all Indorsements upon it.*]

And if the amount thereof be paid to the plaintiff or his attorney within days from the service hereof, further proceedings will be stayed.

NOTICE.

Take notice, that if the defendant do not obtain leave from one of the judges of the courts within twelve days after having been served with this writ, inclusive of the day of such service, to appear thereto, and do within such time cause an appearance to be entered for him in the court out of which this writ issues, the plaintiff will be at liberty, at

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* Compare this indorsement with that provided by R. G., 26 November, 1855, *post*.

any time after the expiration of such twelve days, to sign final judgment for any sum not exceeding the sum above claimed, and the sum of pounds for costs, and issue execution for the same.

Leave to appear may be obtained on an application at the judges' chambers, Serjeant's Inn, London, supported by affidavit showing that there is a defence to the action on the merits, or that it is reasonable that the defendant should be allowed to appear in the action.

Indorsement to be made on the Writ, after Service thereof.

This writ was served by *X. Y.* on *L. M.* [the defendant the defendants] on *Monday* the day of 18 .

By *X. Y.*

(B.)

In the Queen's Bench:

On the day of ; in the year of our Lord 18 .

[*Day of signing Judgment.*]

England, } *A. B.* in his own person [*or* by his attorney]
to wit. } sued out a writ against *C. D.*, indorsed as follows:—

[*Here copy Indorsement of Plaintiff's claim.*]

And the said *C. D.* has not appeared:

Therefore it is considered that the said *A. B.* recover against the said *C. D.* pounds, together with pounds for costs of suit.

See Regulæ Generales of Nov. 26, 1855, and of Hilary Term, 1858, *post.*

THE MERCANTILE LAW AMENDMENT ACT, 1856.*

(19 & 20 VICT. c. 97.)

An Act to amend the Laws of England and Ireland affecting Trade and Commerce.

[29th July, 1856.]

WHEREAS inconvenience is felt by persons engaged in trade by reason of the laws of England and Ireland being in some particulars different from those of Scotland in matters of common occurrence in the course of such trade, and with a view to remedy such inconvenience it is expedient to amend the laws of England and Ireland as hereinafter is mentioned; be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

WRITS OF EXECUTION.

Persons acquiring title to goods before they have been seized or attached under a writ against the seller protected.

1. No writ of *fieri facias* or other writ of execution, and no writ of attachment against the goods of a debtor, shall prejudice the title to such goods acquired by any person *bonâ fide* and for a valuable consideration before the actual seizure or attachment thereof by virtue of such writ; provided such person had not, at the time when he acquired such title, notice that such writ, or any other writ by virtue of which the goods of such owner might be seized or attached, had been delivered to and remained unexecuted in the hands of the sheriff, under-sheriff, or coroner.

By the common law, goods were bound from the date of the

* Although the whole Act is given at length, those sections only, which affect common law procedure, are discussed.

teste of the writ of execution; but by the Statute of Frauds (29 Car. 2, c. 3), s. 16, writs of execution bound goods only from the time of their delivery to the sheriff to be executed. See as to realty, 27 & 28 Vict. c. 112, s. 1, note, *post*.

In a recent case in which a judgment debtor B. made an assignment of all his goods to two creditors W. and H., for the benefit of all his creditors, after B. had notice that a writ of *fi. fa.* had been delivered to the sheriff for execution against his goods, the Court of Queen's Bench held that the property in the goods passed to W. and H. immediately on the execution of the assignment, but that the notice to B. was also notice to W. and H., and therefore the case fell within the proviso of this section, and the goods were liable to seizure under the *fi. fa.* (*Hobson* v. *Thelluson*, L. R. 2 Q. B. 642).

From the words of the section, it may be very plausibly argued that this section does not apply in the case of execution issued out of County Courts.

This section is not retroactive (*Williams* v. *Smith*, L. J. 28 Ex. 286; 2 H. & N. 443).

Specific Delivery of Goods sold.

Specific delivery of goods sold.

2. In all actions and suits in any of the Superior Courts of common law at *Westminster* or *Dublin*, or in any court of record in *England*, *Wales*, or *Ireland*, for breach of contract to deliver specific goods for a price in money, on the application of the plaintiff, and by leave of the judge before whom the cause is tried, the jury shall, if they find the plaintiff entitled to recover, find by their verdict what are the goods in respect of the non-delivery of which the plaintiff is entitled to recover, and which remain undelivered; what (if any) is the sum the plaintiff would have been liable to pay for the delivery thereof; what damages (if any) the plaintiff would have sustained if the goods should be delivered under execution, as hereinafter mentioned, and what damages if not so delivered; and thereupon, if judgment shall be given for the plaintiff, the court or any judge thereof, at their or his discretion, on the application of the plaintiff, shall have power to order execution to issue for the delivery, on payment of such sum (if any) as shall have been found to be payable by the plaintiff as aforesaid, of the said goods, without giving the defendant the option of retaining the same upon paying the damages assessed; and such writ of execution may be for the delivery of such goods; and if such goods so ordered to be delivered, or any part thereof, cannot be found, and unless the court, or such judge or baron as aforesaid, shall otherwise order, the sheriff, or other officer of such court of record, shall distrain

the defendant by all his lands and chattels in the said sheriff's bailiwick, or within the jurisdiction of such other court of record, till the defendant deliver such goods, or, at the option of the plaintiff, cause to be made of the defendant's goods the assessed value or damages, or a due proportion thereof; provided that the plaintiff shall, either by the same or a separate writ of execution, be entitled to have made of the defendant's goods the damages, costs and interest in such action or suit.

The cases in which courts of equity have been in the habit of enforcing the specific performance of contracts relating to personal chattels, are collected in the notes to *Cuddee* v. *Rutter*, in White and Tudor's Leading Cases in Equity, vol. i.; see also *Falcke* v. *Gray*, L. J. 29, Ch. 28, V. C. K.; and C. L. P. A. 1854, s. 78, n. (*ante*, p. 274). The principle to be deduced from them is that specific performance of such contracts only will be enforced in which damages, from the nature of the subject of the contract, are not a reasonably adequate compensation.

When it is intended to apply this section at law, it will be necessary to obtain from the jury, besides a verdict in favour of the plaintiff's right to recover generally for non-delivery of goods sold, and a specification of the goods that remain wrongfully undelivered at the time of the verdict, three distinct assessments:—

Firstly. Of the price payable by the plaintiff for such undelivered goods.

Secondly. Of the damages that would be sustained by the plaintiff, if the goods were delivered under execution; as by reason of injury done to them in the meantime; and perhaps (*sed quære*) by loss of market; and, *semble*, from words of section by loss of interest, where the price has been wholly, or partly paid.

Thirdly. Of the damages sustained through the breach of contract, irrespectively of any specific performance.

With these *data* before them, the court or judge may, if they think the case fit, order specific performance; and the plaintiff may then, upon payment of the amount of the first above assessment (but, *semble*, subject to deduction of the amount of the second assessment, and also of costs of suit), enforce such order by *execution*; and, if the goods cannot be found, by *distringas*, unless the court interposes, as it doubtless would whenever the defendant had, otherwise than fraudulently, become wholly unable to deliver up the coveted chattel. The plaintiff may also, by the same, or by a separate writ, issue execution for his damages (secondly above assessed), his costs, and his interest; but it would seem that these latter claims should, as far as the assessed price of the chattels suffices, be deducted from the amount payable to the defendant, leaving only the balance (if any) to be recovered by the execution for damages, costs, &c.

Where it is intended to proceed under this section, a formal tender of the price agreed, and a demand of the specific chattel, should be made before action.

Probably execution for the specific chattel will not be allowed to issue, unless the writ has been specially indorsed with notice

of the specific claim, and unless that claim is repeated in the declaration.

The sum to be paid to the defendant, as a condition of execution, will probably be required to be paid *into Court* to abide the event of the execution.

In the absence of any decided cases, and of any rules or forms under s. 16, *post*, it is useless to attempt further to define the probable practice.

The provisions of this section may be applied in the county courts (9 & 10 Vict. c. 95, s. 3), where the cause is tried by a jury, but not otherwise.

They do not seem to be applicable to an inquisition of damages before the sheriff (3 & 4 Will. 4, c. 42, s. 16), after a judgment by default (*Jones* v. *Barnes*, 2 M. & W. 313; *Woodroper* v. *Richardson*, 1 A. & E. 76).

See generally C. L. P. A. 1854, ss. 68, 69, 78 (*ante*, pp. 270, 271, 273); and C. L. P. A. 1860, s. 25 (*ante*, p. 316).

GUARANTEE.

Consideration for guarantee need not appear by writing.

3. No special promise to be made by any person after the passing of this act to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the party to be charged therewith or some other person by him thereunto lawfully authorized, shall be deemed invalid to support an action, suit or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document.

This enactment does not alter the law relating to agreements, further than by so far modifying the requirements of the Statute of Frauds (29 Car. 2, c. 3, s. 4), as to dispense with any written statement of the consideration (*Glover* v. *Hackett*, 2 H. & N. 487; L. J. 26, Ex. 416; *Holmes* v. *Mitchell*, 7 C. B. N. S. 361; L. J. 28, C. P. 391).

Guarantee to or for a firm to cease upon a change in the firm, except in special cases.

4. No promise to answer for the debt, default, or miscarriage of another made to a firm consisting of two or more persons, or to a single person trading under the name of a firm, and no promise to answer for the debt, default or miscarriage of a firm consisting of two or more persons, or of a single person trading under the name of a firm, shall be binding on the person making such promise in respect of anything done or omitted to be done after a change shall have taken place in any one or more of the persons constituting the firm, or in the person trading under the name of the firm, unless the intention of the parties that such promise shall continue to be binding notwithstanding such change shall appear either by

express stipulation or by necessary implication from the nature of the firm or otherwise.

This section merely affirms the common law (*Backhouse* v. *Hall*, 6 B. & S. 507; L. J. 34, Q. B. 141).

A surety who discharges the liability to be entitled to assignment of all securities held by the creditor.

5. Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding, at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty, and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him: provided always, that no co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable.

A co-debtor who has paid the entire debt in respect of which judgment had been recovered against himself and the other co-debtors, is entitled under this section to an assignment of such judgment; and it is no defence to an action by him against the judgment creditor for refusing to assign it, to plead that such judgment had become satisfied by payment by such co-debtor after he had been taken in execution on the judgment (*Batchellor* v. *Lawrence*, 9 C. B. N. S. 543; L. J. 30, C. P. 39).

It seems that when the judgment has been assigned, the assignee may issue execution against the co-debtor in the name of the judgment creditor on giving him an indemnity (*Id. per* Erle, C. J.).

Semble, That the courts of law have no jurisdiction, upon *motion*, to order an assignment of securities by a satisfied creditor under this section; but that the remedy is by action (*Phillips* v. *Dickson*, 8 C. B. N. S. 391; L. J. 29, C. P. 223). *Ubi jus, ibi remedium*; where, therefore, a statute gives a right, there, although in express terms it has not given a remedy, the remedy

which by law is properly applicable to that right follows as an incident (*per* Holt, C. J., *Ewer* v. *Jones*, Salk. 415). See also *Tuer* v. *Child*, 6 E. & B. 289.

See a form of declaration under this section in Bullen & Leake's Precedents of Pleadings, 2nd ed. p. 144.

See addenda

BILLS OF EXCHANGE.

Acceptance of a bill inland or foreign to be in writing on it, and signed by the acceptor or his agent.

6. No acceptance of any bill of exchange, whether inland or foreign, made after the thirty-first day of *December*, one thousand eight hundred and fifty-six, shall be sufficient to bind or charge any person, unless the same be in writing on such bill, or, if there be more than one part of such bill, on one of the said parts, and signed by the acceptor or some person duly authorized by him.

What are to be deemed "Inland Bills."

7. Every bill of exchange or promissory note drawn or made in any part of the United Kingdom of *Great Britain* and *Ireland*, the Islands of *Man*, *Guernsey*, *Jersey*, *Alderney*, and *Sark*, and the islands adjacent to any of them, being part of the dominions of her Majesty, and made payable in or drawn upon any person resident in any part of the said United Kingdom or islands, shall be deemed to be an inland bill; but nothing herein contained shall alter or affect the stamp duty, if any, which, but for this enactment, would be payable in respect of any such bill or note.

MERCHANT SHIPPING.

With reference to the repairs of ships, every port within the United Kingdom, &c. a home port.

8. In relation to the rights and remedies of persons having claims for repairs done to, or supplies furnished to or for, ships, every port within the United Kingdom of *Great Britain* and *Ireland*, the Islands of *Man*, *Guernsey*, *Jersey*, *Alderney*, and *Sark*, and the islands adjacent to any of them, being part of the dominions of her Majesty, shall be deemed a home port.

LIMITATION OF ACTIONS.

Limitation of actions for "Merchants' Accounts."

9. All actions of account or for not accounting, and suits for such accounts, as concern the trade of merchandize between merchant and merchant, their factors or servants, shall be commenced and sued within six years after the cause of such actions or suits, or when such cause has already arisen, then within six years after the passing of this act; and no claim in respect of a matter which arose more than six years before

the commencement of such action or suit shall be enforceable by action or suit, by reason only of some other matter of claim comprised in the same account having arisen within six years next before the commencement of such action or suit.

Absence beyond seas or imprisonment of a creditor not to be a disability.

10. No person or persons who shall be entitled to any action or suit with respect to which the period of limitation within which the same shall be brought is fixed by the act of the twenty-first year of the reign of King James the First, chapter sixteen, section three, or by the act of the fourth year of the reign of Queen Anne, chapter sixteen, section seventeen, or by the act of the fifty-third year of the reign of King George the Third, chapter one hundred and twenty-seven, section five, or by the acts of the third and fourth years of the reign of King William the Fourth, chapter twenty-seven, sections forty, forty-one and forty-two, and chapter forty-two, section three, or by the act of the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, section twenty, shall be entitled to any time within which to commence and sue such action or suit beyond the period so fixed for the same by the enactments aforesaid, by reason only of such person, or some one or more of such persons, being at the time of such cause of action or suit accrued beyond the seas, or, in the cases in which by virtue of any of the aforesaid enactments imprisonment is now a disability, by reason of such person or some one or more of such persons being imprisoned at the time of such cause of action or suit accrued.

This section has been held to possess a somewhat retroactive efficacy, so as to deprive causes of action accrued prior to the act, of the protection against the operation of 21 Jac. 1, c. 16, s. 3, previously afforded by s. 7 (*Cornill* v. *Hudson*, 8 E. & B. 429); but see *Jackson* v. *Woolley* (8 E. & B. 778; L. J. 27, Q. B. 448, Ex. Ch.); and note to C. L. P. A. 1860, s. 2 (*ante*, pp. 297, 298); and note to s. 14 (*post*, p. 344).

As to the meaning of "beyond the seas" in stat. 21 Jac. 1, c. 16, s. 7, see *Ruckmaboye* v. *Mottichund* (8 Moore, P. C. C. 4).

Period of limitation to run as to joint debtors in the kingdom, though some are beyond seas.

Judgment recovered against joint debtors in

11. Where such cause of action or suit with respect to which the period of limitation is fixed by the enactments aforesaid or any of them lies against two or more joint debtors, the person or persons who shall be entitled to the same shall not be entitled to any time within which to commence and sue any such action or suit against any one or more of such joint debtors who shall not be beyond the seas at the time

such cause of action or suit accrued, by reason only that some other one or more of such joint debtors was or were at the time such cause of action accrued beyond the seas; and such person or persons so entitled as aforesaid shall not be barred from commencing and suing any action or suit against the joint debtor or joint debtors who was or were beyond seas at the time the cause of action or suit accrued after his or their return from beyond seas, by reason only that judgment was already recovered against any one or more of such joint debtors who was not or were not beyond seas at the time aforesaid.

the kingdom to be no bar to proceedings against others beyond seas after their return.

It would appear from the terms of this section that the case of a judgment recovered against one of the joint debtors who was beyond the seas at the time the cause of action accrued, is not within its remedial operation, and that such a judgment would still be a bar to a subsequent action against any other of the joint debtors.

12. No part of the United Kingdom of *Great Britain* and *Ireland*, nor the Islands of *Man*, *Guernsey*, *Jersey*, *Alderney*, and *Sark*, nor any islands adjacent to any of them, being part of the dominions of her Majesty, shall be deemed to be beyond the seas within the meaning of the act of the fourth and fifth years of the reign of Queen Anne, chapter sixteen, or of this act.

Definition of "beyond seas," within 4 & 5 Anne, c. 16, and this act.

This section is not retroactive (*Flood* v. *Patterson*, 29 Beav. 295; L. J. 30, Ch. 486).

13. In reference to the provisions of the acts of the ninth year of the reign of King *George* the Fourth, chapter fourteen, sections one and eight, and the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, sections twenty-four and twenty-seven, an acknowledgment or promise made or contained by or in a writing signed by an agent of the party chargeable thereby, duly authorized to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by such party himself.

Provision of 9 Geo. 4, c. 14, ss. 1 and 8, and 16 & 17 Vict. c. 113, ss. 24 and 27, extended to acknowledgments by agents.

14. In reference to the provisions of the acts of the twenty-first year of the reign of King *James* the First, chapter sixteen, section three, and of the act of the third and fourth years of the reign of King *William* the Fourth, chapter forty-two, section three, and of the act of the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, section twenty, when there shall be two

Part payment by one contractor, &c. not to prevent bar by certain Statutes of Limitations in favour of another contractor, &c.

or more co-contractors or co-debtors, whether bound or liable jointly only or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor or administrator, shall lose the benefit of the said enactments or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest or other money, by any other or others of such co-contractors or co-debtors, executors or administrators.

This section has at length been held not to be retroactive (*Jackson* v. *Woolley*, 8 E. & B. 778; L. J. 27, Q. B. 448, Ex. Ch.); and *Thompson* v. *Waithman* (3 Drew. 628; L. J. 26, Ch. 134), is no longer followed at law. See further as to retroactive effect of statutes, C. L. P. A. 1860, s. 2, n. (*ante*, pp. 297, 298).

See, as to the application of this section, *Re Seager's Estate*, (L. J. 26, Ch. 809), and *Cockrill* v. *Sparkes* (1 H. & C. 699; L. J. 32, Ex. 118).

Rules and regulations may be made and writs and proceedings framed for the purposes of this act.

15. In order to enable the Superior Courts of common law at *Westminster* and *Dublin*, and the judges thereof respectively, to make rules and regulations, and to frame writs and proceedings for the purpose of giving effect to this act, the two hundred and twenty-third and two hundred and twenty-fourth sections of "The Common Law Procedure Act, 1852," shall, so far as this act is to take effect in England, and the two hundred and thirty-third and two hundred and fortieth sections of "The Common Law Procedure Amendment Act (Ireland), 1853," shall, so far as this act is to take effect in Ireland, be incorporated with this act, as if those provisions had been severally herein repeated and made to apply to this act.

Short title.

16. In citing this act it shall be sufficient to use the expression "The Mercantile Law Amendment Act, 1856."

Extent of act.

17. Nothing in this act shall extend to *Scotland*.

THE JUDGE'S CHAMBERS
(DESPATCH OF BUSINESS)
ACT.
(30 & 31 VICT. c. 68.)

An Act to provide for the better Despatch of Business in the Chambers of the Judges of the Superior Courts of Common Law. [25th July, 1867.]

WHEREAS a great part of the business in the Chambers of the Judges of the three Superior Courts of common law at *Westminster* might with advantage to the public be disposed of by the masters of the said courts; Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

A majority of judges may make rules empowering the masters to transact business at Chambers.

1. It shall be lawful for a majority of all the judges of the said courts, which majority shall include the two chief justices or one of the chief justices and the chief baron, from time to time to make and publish general rules for the following purposes; that is to say:

(1.) For empowering the masters of the said courts, or some one or more of them, to do any such thing and to transact any such business, and to exercise any such authority and jurisdiction in respect of the same, as by virtue of any statute or custom, or by the rules and practice of the said courts or any of them respectively, are now done, transacted, or exercised by a judge of the said courts sitting at chambers, and as shall be specified in any such rule, except in respect of matters relating to the liberty of the subject:

(2.) For regulating the attendance of the said masters at chambers, the course of practice to be there pursued, and the scale of costs to be there adopted:

(3.) For fixing, with the sanction of the lords commissioners of her Majesty's treasury, the table of fees to be taken in respect of business to be transacted before the said

master at chambers, and for abolishing or altering from time to time (with the like sanction) such table of fees.

Under the powers of this section, R. G. M. T. 1867, *post*, have been framed. These rules enumerate the classes of cases in which the masters shall not have jurisdiction except by consent, and give them jurisdiction in all other cases. The same fees are ordered to be taken as were taken in respect of the same matter transacted before a judge, and the scale of costs to be allowed is the same.

Rules to be read in open Court. Copy to be sent to the Lord Chancellor, and to be published in the London Gazette.

2. Every rule to be made under this act shall be read aloud in open court in each of the said courts ten clear days at least before the day fixed for such rule coming into operation, and within one month after that day a copy of every such rule shall be transmitted by the lord chief justice of *England* to the lord high chancellor, and shall also be published in the *London Gazette*.

Rules to be laid before Parliament.

3. Every rule to be made under this act shall be laid before both Houses of Parliament within one month after the making thereof if Parliament be then sitting, or, if Parliament be not then sitting, within one month after the commencement of the next session of Parliament.

Right of appeal from orders of the master.

4. Every order or decision made or given under this act by any master sitting at chambers shall be as valid and binding on all parties concerned as if the same had been made or given before the passing of this act by a judge sitting at chambers: provided always, that it shall be lawful for any person affected by any order or decision of the master forthwith, or within such time as from time to time shall be appointed by any rule or rules to be made under this act, and subject to such conditions as to costs as may be provided under any such rule or rules, to appeal from such decision to a judge sitting at chambers.

The appeal is by summons to be taken out within four days, unless the time be extended (R. G. M. T. 1867, *post*).

The appeal is no stay unless so ordered by a judge or master (*Id.*)

The costs of the appeal are in the judge's discretion (*Id.*)

Repeal of part of s. 11, of 1 Vict. c. 30.

5. So much of the eleventh section of the statute made and passed in the first year of her present Majesty, chapter thirty, as provides that no appointment of any master shall take place by the lord chief justice or lord chief baron until ten days after the certificate in such clause mentioned shall have been laid before both Houses of Parliament, shall be and the same is hereby repealed.

REGULÆ GENERALES.*

Hilary Term, 1853.

Whereas the practice of the Courts of Queen's Bench, Common Pleas, and Exchequer, in civil actions,† in respect of which the said courts possess a common jurisdiction, has been to a great extent superseded or altered by the Common Law Procedure Act, 1852, and it is expedient that the written rules of practice of the said courts should be consolidated and rendered uniform; it is ordered, that all existing written rules of practice in any of the said courts in regard to such civil actions, save and except as regards any step or proceeding heretofore taken, shall be and the same are hereby annulled,‡ and that the practice to be observed in the said courts with respect to the matters hereafter mentioned shall be as follows; that is to say:—

Writ of Summons.

1. When a writ of summons is indorsed in the special form mentioned in sect. 27 of the Common Law Procedure Act, 1852, the following are the amounts which may be indorsed by the plaintiff's attorney or agent upon the writ for costs; and to include mileage: Ante, p. 33.

In actions above 20*l.*								
In town causes -	£3	8	0	In country or agency cases (including mileage) - -	£4	0	0
In actions under 20*l.*								
In town causes -	£2	14	0	In country or agency cases (including mileage) - -	£3	2	0

* These rules were made under the general powers of the Courts and not under the C. L. P. A. 1852, s. 223 (*ante*, p. 178). They were never laid before Parliament, and therefore they have no operation to alter any statute, as the Pl. R. T. T. 1853 (*post*), have. *Rowberry* v. *Morgan*, 9 Ex. 730; L. J. 23, Ex. 191. *Per* Willes, *arguendo*.)

For the cases decided before these rules were made, on the repealed rules of Will. 4, Hil. Term. See Chit Stat. 3rd ed. vol. iii. p. 795, *et seq.*

† As to *quare impedit*, see *Tolson* v. *Bishop of Carlisle* (3 C. B. 41); *Marshall* v. *Bishop of Exeter* (6 C. B. N. S. 716; L. J. 28, C. P. 300); and *Carlisle* v. *Whaley* (L. R. 2 H. L. 391).

‡ *Unwritten* rules of practice remain in force, except so far as inconsistent with the following (*Begg* v. *Forbes*, 13 C. B. 604; L. J. 22, C. P. 222).

Where the plaintiff's attorney, at the time of issuing the writ, claims more than the sums fixed as above, the indorsement on the writ of summons in respect of costs shall be as follows:—"Such sum as shall be allowed on taxation for costs." And in case the plaintiff shall be found not entitled to more costs than such fixed sums, or if more than one-sixth sum shall be disallowed, the plaintiff's attorney shall pay the costs of taxation. So if the attorney has indorsed on the writ one of the fixed sums for the costs of judgment, and claims more costs on signing judgment, and on taxation shall be found not entitled to more than such sum, or if more than one-sixth be taken off on taxation, the plaintiff's attorney shall in like manner pay the costs of taxation.

Appearance.

Ante, p. 35.

2. If two or more defendants in the same action shall appear by the same attorney and at the same time, the names of all the defendants so appearing shall be inserted in one appearance.

Attorney and Guardian.

Ante, p. 32.

3. An attorney not entering an appearance in pursuance of his undertaking shall be liable to an attachment.

4. No attorney shall be changed without the order of a judge.

5. A special admission of *prochein amy*, or guardian, to prosecute or defend for an infant, shall not be deemed an authority to prosecute or defend in any but the particular action or actions specified.

Joinder of Parties.

Ante, p. 43.

6. Whenever a plaintiff shall amend the writ after notice by the defendant, or a plea in abatement of a nonjoinder by virtue of the Common Law Procedure Act, 1852, s. 36, he shall file a consent in writing of the party or parties whose name or names are to be added, together with an affidavit of the handwriting, and give notice thereof to the defendant, unless the filing of such consent be dispensed with by order of the court or a judge.

Pleadings.

7. No side-bar rule for time to declare shall be granted. Ante, p. 56.

8. The defendant shall not be at liberty to waive his plea, or enter a *relictâ verificatione* after a demurrer, without leave of the court or a judge, unless by consent of the plaintiff or his attorney.

See Chit. Prac. 12th ed. vol. ii. pp. 298, 299, and *Cooper* v. *Painter* (13 M. & W. 734, n.), and *Davidson* v. *Bohn* (5 C. B. 170).

9. In case the time for pleading to any declaration or for answering any pleadings, shall not have expired before the tenth day of August in any year, the party called upon to plead, reply, &c., shall have the same number of days for that purpose after the 24th day of October, as if the declaration or preceding pleading had been delivered or filed on the 24th of October. Ante, p. 66.

10. Where a defendant shall plead a plea of judgment recovered, he shall in the margin of such plea state the date of such judgment, and if such judgment shall be in a court of record the number of the roll on which such proceedings are entered, if any; and, in default of his so doing, the plaintiff shall be at liberty to sign judgment as for want of a plea; and in case the same be falsely stated by the defendant, the plaintiff, on producing a certificate from the proper officer or person having the custody of the records or proceedings of the court where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment as therein stated, shall be at liberty to sign judgment as for want of a plea. Ante, p. 52.

This rule applies only to the once well-known and usual plea of judgment recovered by the plaintiff against the defendant for the same demand (*Brokenshir* v. *Monger*, 11 M. & W. 111, *per* Parke, B.) It was held not to apply to a plea, that the plaintiff had set up his claim as a set-off in a former action, and had then failed (*Id.*); nor to a plea by an administrator of an outstanding judgment and no assets *præter* (*Power* v. *Izod, Administrator*, 1 Bing. N. C. 304).

Payment of Money into Court.

11. No affidavit shall be necessary to verify the plaintiff's signature to the written authority to his attorney to take money out of court, unless specially required by the Master. Ante, p. 75.

Ante, p. 76.

12. When money is paid into court in respect of any particular sum or cause of action in the declaration, and the plaintiff accepts the same in satisfaction, the plaintiff, when the costs of the cause are taxed, shall be entitled to the costs of the cause in respect of that part of his claim so satisfied, up to the time the money is so paid in and taken out, whatever may be the result of any issue or issues in respect of other causes of action; and if the defendant succeeds in defeating the residue of the claim, he will be entitled to the costs of the cause in respect of such defence, commencing at "Instructions for Plea," but not before.

When money is paid into court after issue joined, and the plaintiff elects to go on with the action for the residue of his claim, and fails at the trial, he is not entitled, on taxation of costs, to the costs of preparations for trial, even although partly incurred before the payment into court, as the taxation ought then to be considered as taxation of the costs on amendment of pleading, and not under this rule (*Harrold* v. *Smith*, 5 H. & N. 381; L. J. 29, Ex. 141).

Ante, p. 75.

13. Where money is paid into court in several actions which are consolidated, and the plaintiff, without taxing costs, proceeds to trial on one and fails, he shall be entitled to costs on the others up to the time of paying money into court.

Demurrer.

Ante, p. 84.

14. The party demurring may give a notice to the opposite party to join in demurrer in four days, which notice may be delivered separately, or indorsed on the demurrer, otherwise judgment.

Ante, p. 85.

15. No motion or rule for a *concilium* shall be required, but demurrers, as well as all special cases, special verdicts, and appeals from County Courts, shall be set down for argument in the special paper at the request of either party, four clear days before the day on which the same are to be argued, and notice thereof shall be given forthwith by such party to the opposite party.

Ante, p. 84.

16. Four clear days before the day appointed for argument the plaintiff shall deliver copies of the demurrer book, special case, special verdict, or appeal cases, with the points intended to be insisted on, to the Lord Chief Justice of the Queen's Bench or Com-

mon Pleas, or Lord Chief Baron, as the case may be, and the senior puisne judge of the court in which the action is brought; and the defendant shall deliver copies to the two other judges of the court next in seniority; and in default thereof by either party, the other party may on the day following deliver such copies as ought to have been so delivered by the party making default; and the party making default shall not be heard until he shall have paid for such copies, or deposited with the Master a sufficient sum to pay for such copies. If the statement of the points have not been exchanged between the parties, each party shall, in addition to the two copies left by him, deliver also his statement of the points to the other two judges, either by marking the same in the margin of the books delivered or on separate papers.

The only proper place for delivering the books is the judge's chambers in Serjeant's Inn (*Howells* v. *Wynne*, 15 C. B. N. S. 11; L. J. 32, M. C. 241).

17. When there shall be a demurrer to part only of the declaration or other subsequent pleadings, those parts only of the declarations and pleadings to which such demurrer relates shall be copied into the demurrer books; and if any other parts shall be copied, the Master shall not allow the costs thereof, on taxation, either as between party and party, or as between attorney and client. Ante, p. 84.

Venue, Change of.

18. No venue shall be changed without a special order of the court or a judge, unless by consent of the parties. Ante, p. 60.

An attorney suing in person has the right to lay the venue in transitory actions in Middlesex, and the court have no power to change it (*Grace* v. *Wilmer*, L. J. 26, Q. B. 1).

Particulars of Demand or Set-off.

19. With every declaration (unless the writ has been specially indorsed under the provisions contained in the 25th section of the Common Law Procedure Act, 1852), delivered or filed, containing causes of action such as those set forth in Schedule (B.) of that act, and numbered from 1 to 14 inclusive, or of a like nature, the plaintiff shall deliver or file full particulars of his demand under such claim, where such parti- Ante, p. 63.

culars can be comprised within three folios; and where the same cannot be comprised within three folios, he shall deliver or file such a statement of the nature of his claim, and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios; and with every plea of set-off containing claims of a similar nature as those in respect of which a plaintiff is required to deliver or file particulars, the defendant shall in like manner deliver particulars of his set-off. And to secure the delivery or filing of particulars in all such cases, it is ordered, that if any such declaration shall be delivered or filed, or any plea of set-off delivered, without such particulars or such statement as aforesaid, and a judge shall afterwards order a delivery of particulars, the plaintiff or defendant, as the case may be, shall not be allowed any costs in respect of any summons for the purpose of obtaining such order, or of the particulars he may afterwards deliver; and a copy of the particulars of the demand, and set-off, shall be annexed by the plaintiff's attorney to every record at the time it is entered with the proper officer.

Particulars of claim have been ordered by a judge in an action for an injury to the person by negligent driving (*Wicks* v. *Macnamara*, 3 H. & N. 568); see also *Horlock* v. *Lediard* (10 M. & W. 677).

The defendant, in an action for calls, having pleaded fraud, was ordered to give particulars thereof (*M'Creight, O. M.* v. *Stevens*, L. J. 31, Ex. 455); so in an action on a policy of life insurance, where the defendant pleaded that the proposal, the basis of the policy, was untrue, the court ordered particulars of the symptoms of the disease alleged (*Marshall* v. *Emperor Life Assurance Society*, L. R. 1, Q. B. 35).

20. A summons for particulars, and order thereon, may be obtained by a defendant before appearance, and may be made, if the judge think fit, without the production of any affidavit.

Ante, p. 66.

21. A defendant shall be allowed the same time for pleading after the delivery of particulars under a judge's order which he had at the return of the summons, unless otherwise provided for in such order.

Security for Costs.

22. An application to compel the plaintiff to give security for costs must, in ordinary cases, be made before issue joined.

Security for Costs generally.

Security for costs generally.

An application to compel the plaintiff to give security for costs must, in *ordinary* cases (see *Gell* v. *Curzon*, 4 Exch. 813), be made before issue joined (R. G. H. T. 1853, r. 22, *supra*); but it may be made after issue joined, if the necessity for it has then first come to the defendant's knowledge, and no step has been taken by the defendant in the cause subsequently to such knowledge having been acquired (*Duncan* v. *Stint*, 5 B. & A. 702); but it can only be made after appearance in an ordinary action, although the affidavit on which it is made need not disclose the state of the proceedings (*Cole* v. *Beardy*, 5 Dowl. 161); and so also in cases under C. L. P. A. 1854, s. 93 (*ante*, p. 261).

In order to have a stay of proceedings in the rule *nisi*, in an application for security for costs, a demand must be made to the claimant, before the court or a judge is applied to (*Bailie* v. *De Bernales*, 1 B. & A. 331); and, unless such application be made, the defendant may have to pay the costs of the motion (*Fletcher* v. *Lew*, 3 A. & E. 551). Two days' notice of the application must also be served on the claimant (R. G. H. T. 1853, r. 160); but this notice is not equivalent to a demand of security (*Huntley* v. *Bulmer*, 6 Dowl. 633); the rule absolute will, however, stay the proceedings without a previous application, until the security is given.

Absence abroad.

Irrespectively of the provisions of C. L. P. A. 1854, s. 93 (*ante*, p. 261), security for costs may be ordered whenever the plaintiff, or, if several, where all the plaintiffs (*M'Connell* v. *Johnstone*, 1 East, 431; *Thomel* v. *Roelants*, 2 C. B. 290), permanently (*Henschen* v. *Garves*, 2 H. Bl. 383; *Foss* v. *Wagner*, 2 Dowl. 499; *Drummond* v. *Tillinghirst*, 16 Q. B. 740) reside anywhere out of the jurisdiction (*Baxter* v. *Morgan*, 6 Taunt. 379; *Chevalier, exors. &c.* v. *Finnis*, 1 B. & B. 277; *Limerick Railway Company* v. *Fraser*, 4 Bing. 394; *Tambisco* v. *Pacifico*, 7 Ex. 816, L. J. 21, Ex. 276). But a distinction is made between domiciled *Englishmen* on the one hand, and other British subjects and foreigners, strictly so called, on the other (*Chappell* v. *Watts*, 2 E. & E. 879; L. J. 29, Q. B. 167). In the case of an *Englishman*, the absence that entitles a defendant to security for costs must be voluntary, as distinguished from absence in the service of the state (*Whitall* v. *Campbell*, 5 H. & N. 601; L. J. 29, Ex. 326).

So a plaintiff in the civil service of the East India Company and residing within its territory, was liable to give security for costs (*Plowden* v. *Campbell*, L. J. 23, Q. B. 384).

The *foreign* master of a *foreign* ship, though regularly trading to and from England, may be required to give security for costs (*Nylander* v. *Barnes*, 6 H. & N. 509; L. J. 30, Ex. 151); *aliter* in the case of an *English* ship (*Henschen* v. *Garves*, *ubi supra*).

Where a plaintiff's body is at the disposal of the crown, as where he is confined (even in England) under sentence of transportation, security may be required (*Barrett* v. *Power*, 9 Ex. 338, L. J. 23, Ex. 162); but see *Maria* v. *Hall* (2 B. & P. 336).

Where a plaintiff carries on business abroad, and had no permanent residence in England, but was in England at the time of bringing the action, and, it was sworn, had no intention of leaving the country; it was held that this was no sufficient answer to an application for security for costs, inasmuch as it was not

formerly swore that he resided and intended to continue to reside here; and it was also held that it was no answer to such application that the action was brought in pursuance of liberty obtained in the Vice-Chancellor's, it not being brought by his direction. (Jones v. Jones, 5 B. & A. 906).

The possession by the plaintiff of real property available to process against him is an answer to an application for security for costs, unless the plaintiff be a foreigner. (*Swinburne* v. *Carter*, 1 L. M. & P. 71, per Crompton, J., B. C.)

Peers (*Lord Anglesea* v. *Hanmer*, 2 Dowl. 636) and others (*Duke of Buccleuch* v. *Cockburn*, 5 M. & S. 509) who are privileged from personal process are, as a consequence, and because their persons are for purposes of execution beyond the reach of the ordinary civil process of the courts, exempt from liability to give security for costs; but foreign sovereigns are not thus exempt (*The King of Prussia* v. *Wright*, 6 Dowl. 121).

Security must be required from foreign companies (*Limerick Railway Company* v. *Fraser*, *ubi supra*).

Executors in respect to and in interpleader are upon the same footing in respect to security for costs, as plaintiffs in other actions (but see *Rodgers* v. *Jones*, L. J. 29, Q. B. 97; *Selby* v. *Harrison*, 3 K. & B. 381; *Bennett* v. *Bennett*, 1 C. B. 313; *Williams* v. *Dowling*, 4 D. & L. 649).

Actions under 3 & 4 Will. 4, c. 42, s. 29, in which costs may be recovered, and in which, therefore, security for costs may be ordered (*Holmes* v. *Pemberton*, 5 D. & L. 104).

The poverty of a plaintiff is, by itself, no ground for ordering security for costs (*Jeffery* v. *Burridge*, 2 C. & M. 336; *Ross* v. *Jones*, 3 M. & W. 324; but see that plaintiff is suing on behalf of another (*Lancaster Canal Company* v. *Mountsteddire Railway Company*, 2 Railway Cases, 1847, p. 133; 16 L. T. N. S. 289, Ex. Ch.; but in action brought under Lord Campbell's Act); but where a person in insolvent circumstances sues substantially (*Tennent* v. *Brown*, 3 K. & C. 208; *Clifford* v. *Brennan*, 10 Ir. Com. Law Rep. 34; or on behalf of another, security for costs may be required (*Lancaster* v. *Lancaster*, 13 C. B. 291, L. J. 24, C. P. 38); but see *Rodgers* v. *Jones* (*ubi supra*).

Where a trustee is an infant, who has been appointed *prochein ami* to sue on his behalf, unless and to be insolvent, the Court will require that unless it appears that no other person can be found who will undertake in his place (*Lees* v. *Smith*, 5 H. & N. 632, 29 L. J. Ex. 354).

Under the County Courts Act, 1867 (30 & 31 Vict. c. 142, s. 10), it is enacted that "it shall be lawful for any person against whom an action for malicious prosecution, illegal arrest, illegal detention, assault, false imprisonment, libel, slander, seduction, or breach of promise of marriage may be brought in a superior court, to make an affidavit that the plaintiff has no visible means of maintaining himself, and that the defendant believes a verdict not be found against him; and thereupon a judge of the court in which the action is brought shall have power to make an order that unless the plaintiff shall, within a time to be therein mentioned, give such security for the defendant's costs to the satisfaction of one of the masters of the said court, or satisfy the judge that he has a good cause of action, and intends in good faith to prosecute the same in the superior court, and that the cause of the action shall be stayed; or in the event of the plaintiff being unable or unwilling to give such security, or

failing to satisfy the judge as aforesaid, that the cause be remitted for trial before a county court to be therein named; and thereupon the plaintiff shall lodge the original writ and the order with the registrar of such county court, who shall appoint a day for the hearing of the cause, notice whereof shall be sent by post or otherwise by the registrar to both parties or their attorneys; and the county court so named shall have all the same powers and jurisdiction with respect to the cause as if both parties had agreed, by a memorandum signed by them, that the said county court should have power to try the said action,* and the same had been commenced by plaint in the said county court: and the costs of the parties, in respect of the proceedings subsequent to the order of the judge of the superior court shall be allowed according to the scale of costs in use in the county courts, and the costs of the proceedings in the superior courts shall be allowed according to the scale in use in such latter court."

As to the retrospective operation of this section, which came into operation on the 1st of January, 1868, see *Wood* v. *Riley* (L. R. 3 C. P. 26), and C. L. P. Act, 1860, s. 34, n. (*ante*, p. 323).

See generally upon the subject of security for costs, Chit. Arch. Prac. 12th ed. index, title "Security for Costs." and see *Whitall* v. *Campbell*, *ubi supra*, where it was held that a former servant of the East India Company, whose services had been transferred to the crown by virtue of the 21 & 22 Vict. c. 106, was, while in India on such service, exempt from giving security for costs upon suing here; also *Chapple* v. *Watts*, *ubi supra*, where it was held that an officer, not shown to have any residence in England, and who was a native of Ireland, and serving with his regiment there, was not exempt from being compelled to give security for costs in an action brought by him, inasmuch as it did not appear that he was *removed out of* the jurisdiction by the orders of the crown. A defendant residing abroad who has brought error, and has not put in bail in error, may be required to give security for costs (*Hill* v. *Fox*, 3 H. & N. 547).

See as to security for costs under "The Joint Stock Companies' Act, 1857," s. 24 (*Australian Steam Ship Company* v. *Fleming*, 4 Kay & J. 407).

In the case of joint stock companies with limited liability, provision is made for security for costs by the Companies' Act, 1862, s. 69, *infra*.†

DISCONTINUANCE.

23. To entitle a plaintiff to discontinue after plea pleaded, it shall not be necessary to obtain the defendant's consent, but the rule shall contain the undertaking on the part of the plaintiff to pay the costs, and a consent that if they are not paid within four days

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* This refers to 19 & 20 Vict. c. 108, s. 23.

† "Where a limited company is plaintiff or pursuer in any action, suit or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by any credible testimony that there is reason to believe that if the defendant be successful in his defence the assets of the company will be insufficient to pay his costs, require sufficient security to be given for such costs, and may stay all proceedings until such security is given."

distinctly sworn that he resided and intended to continue to reside here; and it was also held, that it was no answer to such application, that the action was brought in pursuance of liberty reserved by the Vice-Chancellor, it not being brought by his direction (*Olive* v. *Johnson*, 5 B. & A. 908).

The possession by the plaintiff of real property available to process against him, is an answer to an application for security for costs, unless the plaintiff be a foreigner (*Swinburne* v. *Carter*, L. J. 23, Q. B. 16; *per* Crompton, J., B. C.)

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Security may be required from foreign companies (*Limerick Railway Company* v. *Fraser*, *ubi supra*).

Defendants in replevin and in interpleader are upon the same footing, in respect to security for costs, as plaintiffs in other actions (but see *Ridgway* v. *Jones*, L. J. 29, Q. B. 97; *Selby* v. *Crutchley*, 1 B. & B. 505; *Benazeck* v. *Bessett*, 1 C. B. 313; *Williams* v. *Crossling*, 4 D. & L. 660).

Auditâ querelâ is an action within the meaning of 3 & 4 Will. 4, c. 42, s. 34, in which costs may be recovered, and in which, therefore, security for costs may be ordered (*Holmes* v. *Pemberton*, 1 E. & E. 369).

Poverty of plaintiff.

The poverty of a plaintiff is, by itself, no ground for ordering security for costs (*Gregory* v. *Eldridge*, 2 C. & M. 336; *Ross* v. *Jacques*, 8 M. & W. 135); nor that plaintiff is suing on behalf of another (*Larsen, Administratrix*, v. *Monmouthshire Railway Company*, 2 Weekly Notes, 1867, p. 133; 16 L. T. N. S. 289, Ex. E. T. an action brought under Lord Campbell's Act); but where a person in insolvent circumstances sues substantially (*Tenant* v. *Brown*, 5 B. & C. 208; *M'Caffrey* v. *Brennan*, 10 Ir. Com. Law Rep. 159, Ex.) on behalf of another, security for costs may be required (*Goatley* v. *Emmart*, 15 C. B. 291, L. J. 24, C. P. 38); but see in Interpleader, *Ridgway* v. *Jones* (*ubi supra*).

When a relative of an infant, who has been appointed *prochein ami* to sue on his behalf, turns out to be insolvent, the Court will remove him, unless it appears that no other person can be properly appointed in his place (*Lees* v. *Smith*, 5 H. & N. 632, L. J. 29, Exch. 294).

30 & 31 Vict. c. 142, s. 10.

Now by the County Courts Act, 1867 (30 & 31 Vict. c. 142, s. 10), it is enacted that "It shall be lawful for any person against whom an action for malicious prosecution, illegal arrest, illegal distress, assault, false imprisonment, libel, slander, seduction, or other action of tort may be brought in a superior court, to make an affidavit that the plaintiff has no visible means of paying the costs of the defendant should a verdict not be found for the plaintiff; and thereupon a judge of the court in which the action is brought shall have power to make an order that unless the plaintiff shall, within a time to be therein mentioned, give full security for the defendant's costs to the satisfaction of one of the masters of the said court, or satisfy the judge that he has a cause of action fit to be prosecuted in the superior court, all proceedings in the action shall be stayed; or in the event of the plaintiff being unable or unwilling to give such security, or

failing to satisfy the judge as aforesaid, that the cause be remitted for trial before a county court to be therein named; and thereupon the plaintiff shall lodge the original writ and the order with the registrar of such county court, who shall appoint a day for the hearing of the cause, notice whereof shall be sent by post or otherwise by the registrar to both parties or their attorneys; and the county court so named shall have all the same powers and jurisdiction with respect to the cause as if both parties had agreed, by a memorandum signed by them, that the said county court should have power to try the said action,* and the same had been commenced by plaint in the said county court: and the costs of the parties, in respect of the proceedings subsequent to the order of the judge of the superior court shall be allowed according to the scale of costs in use in the county courts, and the costs of the proceedings in the superior courts shall be allowed according to the scale in use in such latter court."

As to the retrospective operation of this section, which came into operation on the 1st of January, 1868, see *Wood* v. *Riley* (L. R. 3 C. P. 26), and C. L. P. Act, 1860, s. 34, n. (*ante*, p. 323).

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DISCONTINUANCE.

23. To entitle a plaintiff to discontinue after plea pleaded, it shall not be necessary to obtain the defendant's consent, but the rule shall contain the undertaking on the part of the plaintiff to pay the costs, and a consent that if they are not paid within four days

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* This refers to 19 & 20 Vict. c. 108, s. 23.

† "Where a limited company is plaintiff or pursuer in any action, suit or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by any credible testimony that there is reason to believe that if the defendant be successful in his defence the assets of the company will be insufficient to pay his costs, require sufficient security to be given for such costs, and may stay all proceedings until such security is given."

after taxation defendant shall be at liberty to sign judgment of *non pros.*

If the plaintiff does not pay the costs, the defendant may sign judgment of *non pros.* Where, under the former practice, the defendant moved for judgment as in case of a nonsuit, the court discharged the rule (*Cooper* v. *Holloway*, 1 Hodg. 76); and in a case where the plaintiff, instead of paying the costs, took the cause to trial and got a verdict, the court refused to disturb it (*Edgington* v. *Proudman*, 1 Dowl. 152).

See as to costs upon a discontinuance after an abortive trial, *Daniel* v. *Wilkin* (8 Ex. 156; L. J. 22, Ex. 73).

Staying Proceedings.

Ante, p. 7.

24. In any action against an acceptor of a bill of exchange, or the maker of a promissory note, the defendant shall be at liberty to stay proceedings on payment of the debt and costs in that action only.

See *Smith* v. *Woodcock* (4 T. R. 691).

Cognovit; Warrant of Attorney; Judge's Order for Judgment.

25. No judgment shall be signed upon any cognovit or any warrant of attorney without such cognovit or warrant being delivered to and filed by the Master, who is hereby ordered to file the same in the order in which it is received.

See *Cooper* v. *Grant* (12 C. B. 154).

An action does not lie upon a warrant of attorney (*Sherborn* v. *Lord Huntingtower*, 13 C. B. N. S. 742), nor upon a judge's order, even though made by consent, where the order gives a particular remedy for enforcing the order, *e. g.* by issuing execution (*Hookpayton* v. *Bussell*, 10 Exch. 24; L. J. 23, Ex. 267; and see *Thames Iron Works Company* v. *Patent Derrick Company*, 1 J. & H. 93; L. J. 29, Ch. 714); but an action may be maintained on a judge's order of reference, made by consent, this being evidence of an agreement between the parties to perform the award (*Lievesley* v. *Gilmore*, L. R. 1, C. P. 570).

26. Leave to enter up judgment on a warrant of attorney above one and under ten years old, is to be obtained by order of a judge made *ex parte*, and if ten years old or more, upon a summons to show cause.

It must be shown that the defendant was alive within a reasonable time (*Stocks* v. *Willes*, 5 Dowl. 221). Where the defendant is abroad, greater latitude is allowed (*Johnson* v. *Fry*, 5 Dowl. 215).

See, for circumstances under which leave may be refused, *Sherborn* v. *Lord Huntingtower* (11 W. R. 145, Q. B. M. T. 1862).

27. Every attorney or other person who shall prepare any warrant of attorney to confess judgment which is to be subject to any defeasance, shall cause such defeasance to be written on the same paper or parchment on which the warrant is written, or cause a memorandum in writing to be made on such warrant, containing the substance and effect of such defeasance.

28. The costs of filing a judge's order for judgment against a trader defendant under the Bankrupt Act, shall not be allowed unless specially ordered by the judge.

EVIDENCE; ADMISSION AND INSPECTION OF DOCUMENTS; SUBPŒNA TO PRODUCE RECORDS; DEPOSITIONS ON INTERROGATORIES.

29. The form of notice to admit documents referred to in the Common Law Procedure Act, 1852, section 117, may be as follows:— Ante, pp. 101, 102.

In the Q. B. / C. P. / or Exchequer. *A. B. v. C. D.*

Take notice, that the {*Plaintiff* / *Defendant*} *in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the* {*Defendant* / *Plaintiff*} *his attorney or agent at , on , between the hours of ; and the* {*Defendant* / *Plaintiff*} *is hereby required, within 48 hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed, as they purport respectively to have been; that such as are specified as copies, are true copies; and such documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered respectively, saving all just exceptions to the admissibility of all such documents as evidence in this cause. Dated, &c.*

G. H., *Attorney*
[or "*Agent*" *for* {*Plaintiff* / *Defendant.*}]

To E. F., *Attorney*
[or "*Agent*"] *for* {*Defendant* / *Plaintiff.*}

[Here describe the documents, the manner of doing which may be as follows:]

Originals.

Description of the Documents.	*Date.*
Deed of covenant between *A. B.* and *C. D.* 1st part; and *E. F.* 2nd part.....	1st January, 1848.
Indenture of lease from *A. B.* to *C. D.*.....	1st February, 1848.
Indenture of release between *A. B.*, *C. D.*, 1st part, &c.....	2nd February, 1848.
Letter, defendant to plaintiff.....	1st March, 1848.
Policy of insurance on goods by ship *Isabella* on voyage from Oporto to London.	3rd December, 1847.
Memorandum of agreement between *C. D.*, captain of said ship, and *E. F.*.....	1st January, 1848.
Bill of exchange for 100*l.* at three months, drawn by *A. B.* on and accepted by *C. D.*, indorsed by *E. F.* and *G. H.*	1st May, 1849.

Copies.

Description of Documents.	*Dates.*	*Original or Duplicate, served, sent, or delivered, when, how, and by whom.*
Register of baptism of *A. B.* in the parish of *X*.....	Jan. 1, 1808.	
Letter — plaintiff to defendant	Feb. 1, 1848.	Sent by General Post, Feb. 2, 1848.
Notice to produce papers	March 1, 1848.	Served March 2, 1848, on defendant's attorney, by *E. F.* of—
Record of a judgment of the Court of Queen's Bench in an action, *J. S.* v. *J. N.*.....	Trinity Term, 10th Vict.	
Letters patent of King Charles II. in the Rolls Chapel ..	Jan. 1, 1680.	

The form given by this rule is similar to that given by the rule H. T. 4 Will. 4. It is applicable only to documents in the custody or under the control of the party giving the notice; but if the notice is intended to apply to other documents it may be varied accordingly, and the party giving it may, "if necessary, insert a special clause stating his inability, for such and such reasons, to give an inspection of the documents" (*per* Rolfe, B., *Rutter* v. *Chapman*, 8 M. & W. 388, 394, cited *ante*, p. 102).

Ante, p. 102.

30. In all cases of trials, writs of inquiry, or inquisitions of any kind, either party may call on the other party, by notice, to admit documents in the manner provided by and subject to the provisions of the Common Law Procedure Act, 1852; and in case

of the refusal or neglect to admit after such notice given, the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be; unless at the trial or inquisition the judge or presiding officer shall certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except in cases where the omission to give the notice is, in the opinion of the Master, a saving of expense.

31. An order upon the lord of a manor to allow the usual limited inspection of the court rolls, on the application of a copyhold tenant, may be absolute in the first instance, upon an affidavit that the copyhold tenant has applied for and been refused inspection. Ante, p. 254.

As to the former practice, see *R.* v. *Shelley* (3 T. R. 141). As to unlimited inspection of the court rolls, see *Warrick* v. *Queen's College, Oxford* (L. R. 3 Ex. 683); and as to payment of steward's fees for such inspection, see *Hoare* v. *Wilson* (L. R. 4 Ex. 1).

32. No subpœna for the production of an original record shall be issued, unless a rule of court or the order of a judge shall be produced to the officer issuing the same, and filed with him, and unless the writ shall be made conformable to the description of the document mentioned in such rule or order.

33. All depositions of witnesses taken under the order of a judge, rule of court, or writ of commission, shall be returned to and filed in the office of the masters of the court in which the action or proceeding is pending. Ante, pp. 249, 262.

Trial, Notice of Trial, and Inquiry.

34. Notice of trial or inquiry, and of continuance of trial or inquiry, shall be given in town; but countermand of notice of trial or inquiry may be given either in town or country, unless otherwise ordered by the court or a judge. Ante, p. 89.

The frequency of resort to writs of trial seems to justify the insertion here of the statutory enactments concerning them.

3 & 4 Will. 4, c. 42. 3 & 4 Will. 5, c. 42.

An Act for the further Amendment of the Law, and the better Advancement of Justice.

Section 17. *That in any action depending in any of the said superior courts for any debt or demand in which the sum sought to* Sec. 17. Power to di-

rect issues joined in certain occasions to be tried before the sheriff or any judge. *Repealed by* 30 & 31 *Vict.* c. 142, s. 6.

be recovered, and indorsed on the writ of summons, shall not exceed twenty pounds, it shall be lawful for the court in which such suit shall be depending, or any judge of any of the said courts, if such court or judge shall be satisfied that the trial will not involve any difficult question of fact or law, and such court or judge shall think fit so to do, to order and direct that the issue or issues joined shall be tried before the sheriff of the county where the action is brought, or any judge of any court of record for the recovery of debt in such county, and for that purpose a writ shall issue directed to such sheriff, commanding him to try such issue or issues, by a jury to be summoned by him, and to return such writ with the finding of the jury thereon indorsed, at a day certain, in term or in vacation, to be named in such writ; and thereupon such sheriff or judge shall summon a jury, and shall proceed to try such issue or issues.*

Sect. 18. *Upon the return of a writ of inquiry or a trial of issues, judgment to be signed, unless, &c. Sheriff, as to such issues, to have the like powers as judges at* nisi prius.

Section 18. That at the return of any such writ of inquiry, or writ for the trial of such issue or issues as aforesaid, costs shall be taxed, judgment signed, and execution issued forthwith, unless the sheriff or his deputy before whom such writ of inquiry may be executed, or such sheriff, deputy, or judge before whom such trial shall be had, shall certify under his hand upon such writ that judgment ought not to be signed until the defendant shall have had an opportunity to apply to the court for a new inquiry or trial, or a judge of any of the said courts shall think fit to order that judgment or execution shall be stayed till a day to be named in such order; and the verdict of such jury on the trial of such issue or issues shall be as valid and of the like force as a verdict of a jury at *nisi prius*; and the sheriff, or his deputy, or judge, presiding at the trial of such issue or issues, shall have the like powers with respect to amendment on such trial as are hereinafter given to judges at *nisi prius*.

The above section (3 & 4 Will. 4, c. 42, s. 17) is repealed by section 6 of the County Courts Act, 1867 (30 & 31 Vict. c. 142), which came into operation on the 1st January, 1867 (see *Wood* v. *Riley*, L. R. 3 C. P. 26); and in lieu thereof s. 7 of that act, *infra*, contains provisions for the trial of certain causes in the county court.

To found jurisdiction under these enactments, the sum substantially (*Allen* v. *Pink*, 4 M. & W. 140) sought to be recovered, and indorsed upon the writ (*Gosling* v. *Cotterell*, 14 M. & W. 71), must not have exceeded 20*l.* (*Burleigh* v. *Kingdom*, 2 C. & M. 476); but see, as to interest recovered, *ultra* debt, and *quâ* damages, *Gutteridge* v. *Seth* (2 Dowl. N. S. 954; and see *Fryer* v. *Smith*, 5 M. & G. 605). The claim must therefore have been for *liquidated* (*Jacquoi* v. *Boura*, 5 M. & W. 155) damages for breach of *contract* (*Smith* v. *Brown*, 2 M. & W. 851): nor could consent give jurisdiction (*Ib.*); but in a recent case where an action of tort was thus tried by consent, and the plaintiff succeeded at the trial, the Court of Exchequer refused to set aside the proceedings upon motion for want of jurisdiction, and left the defendant to his remedy by writ of error (*Carter* v. *Wright*, 16 W. R. 110, M. T. 1867).

An action of detinue where the value of the goods as claimed

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* Therefore in a suit removed from the County Court as there was no writ of summons, no writ of trial could issue. (*Perry* v. *Bennett*, 14 C. B. N. S. 402; L. J. 33, C. P. 45).

did not exceed 20*l.* might have been tried under the above section. (*Walker* v. *Needham*, 3 M. & G. 557).

The sheriff's jurisdiction expired upon the writ becoming returnable; and any trial after that time was a mere nullity (*Cox* v. *Norton*, L. J. 23, Ex. 248).

The officer presiding at the trial might have adjourned the trial, or the plaintiff might have withdrawn the writ (*Shaw* v. *Owen*, 17 C. B. 524; L. J. 25, C. P. 103).

Rules *nisi* for new trials in cases tried under writs of trial must have been drawn up on reading the notes of the presiding officer; and these must have been verified by affidavit (*Johnson* v. *Wells*, 2 C. & M. 428; *Thomas* v. *Edwards*, 1 C. M. & R. 382). No new trial was granted in any case tried under a writ of trial, where the verdict was for less than 5*l.* (*Williams* v. *Evans*, 2 M. & W. 220).

19 & 20 *Vict.* c. 108, *s.* 26.

Under the 19 & 20 Vict. c. 108, s. 26, actions for liquidated claims, whereof a sum not exceeding 50*l.* remains in dispute, may, in certain cases, be sent down to be tried in county courts. The enactment is as follows:—"Where, in any action of contract brought in a superior court, the claim indorsed on the writ does not exceed fifty pounds, or where such claim, though it originally exceeded fifty pounds, is reduced by payment into court, payment, an admitted set-off, or otherwise, to a sum not exceeding fifty pounds, a judge of a superior court, on the application of either party, after issue joined, may, in his discretion, and on such terms as he shall think fit, order that the cause be tried in any county court which he shall name; and thereupon the plaintiff shall lodge with the registrar of such court such order and the issue; and the judge of such court shall appoint a day for the hearing of the cause, notice whereof shall be sent, by post or otherwise, by the registrar to both parties or their attorneys; and after such hearing the registrar shall certify the result to the master's office of such superior court; and judgment in accordance with such certificate may be signed in such superior court."

Under this section, a judge ordered that the trial in an action brought in the Queen's Bench should be had in a county court: no application was made to him to impose any terms: the action having been tried, the costs were taxed by the master according to the scale of the superior courts, so far as regarded the proceedings in the Queen's Bench; but so far as regarded the proceedings in the county court, according to the county court scale. On motion to review his taxation, it was held, that he was justified in so far adopting the county court scale as his guide (*Wheatcroft* v. *Foster*, E. B. & E. 737; L. J. 27, Q. B. 277).

30 & 31 *Vict.* c. 142, *s.* 7.

The County Courts Act, 1867 (30 & 31 Vict. c. 142), referred to above, by section 7, extends the principle of the 19 & 20 Vict. c. 108, s. 26, and confirms the rule of costs approved of in *Wheatcroft* v. *Foster* (*ubi supra*); this section which came into operation on the 1st of January, 1868 (see *Wood* v. *Riley*, L. R. 3 C. P. 26), is as follows:—

"Where in any action of contract brought or commenced in any of her Majesty's superior courts of common law the claim indorsed on the writ does not exceed fifty pounds, or where such claim, though it originally exceeded fifty pounds, is reduced by payment, an admitted set-off, or otherwise, to a sum not exceeding fifty pounds, it shall be lawful for the defendant in the action,

within eight days from the day upon which the writ shall have been served upon him, if the whole or part of the demand of the plaintiff be contested, to apply to a judge at chambers for a summons to the plaintiff to show cause why such action should not be tried in the county court or one of the county courts in which the action might have been commenced;* and on the hearing of such summons the judge shall, unless there be good cause to the contrary, order such action to be tried accordingly, and thereupon the plaintiff shall lodge the original writ and the order with the registrar of the county court mentioned in the order, who shall appoint a day for the hearing of the cause, notice whereof shall be sent by post or otherwise by the registrar to both parties or their attorneys, and the cause and all proceedings therein shall be heard and taken in such county court, as if the action had been originally commenced in such county court; and the costs of the parties in respect of proceedings subsequent to the order of the judge of the superior court shall be allowed according to the scale of costs in use in the county courts, and the costs of the proceedings previously had in the superior court shall be allowed according to the scale in use in such latter court."

As to what actions may under this section be tried in the county court, see note to 3 & 4 Will. 4, c. 42, ss. 17, 18 (*ante*, p. 360.)

As to the retrospective operation of this statute, see C. L. P. A. 1860, s. 34, n. (*ante*, p. 322).

Where a cause is tried in the county court under 19 & 20 Vict. c. 108, s. 26, the jurisdiction to grant a new trial remains in the superior court (*Balmforth* v. *Pledge*, L. R. 1 Q. B. 427); and the application for this purpose must be made to the court within the same period from the trial as if it had taken place in the superior court, without regard to the time of the filing of the registrar's certificate in the master's office (*Copcutt* v. *G. W. Railway Co.* L. R. 2 C. P. 465).

Ante, p. 89.

35. The expression "short notice of trial," or "short notice of inquiry," shall in all cases be taken to mean four days.

See *Flowers* v. *Welch* (9 Exch. 272).

As to the mode of computing the days, see r. 174, *post*.

A defendant is only bound to take short notice, if under terms to do so, for the next sittings specified. If the plaintiff allows a sittings to pass, he must give the ordinary ten days' notice under the C. L. P. A. 1852, s. 97 (*Dignam* v. *Ibbotson*, 3 M. & W. 431).

Ante, p. 90.

36. Notice of trial or inquiry may be continued to any sitting in or after term, on giving a notice of continuance four days before the time mentioned in the notice of trial or inquiry, unless short notice of

* By sect. 1, it is enacted, that—"A plaint may be entered in the County Court within the district of which the defendant or one of the defendants shall dwell or carry on his business at the time of bringing the action or suit, or it may be entered, by leave of the judge or registrar, in the County Court within the district of which the defendant or one of the defendants dwelt or carried on business, at any time within six calendar months next before the time of action or suit brought, or, with the like leave, in the County Court in the district of which the cause of action or suit wholly or in part arose."

trial or inquiry has been given, in which cases two days' previous notice shall be sufficient, unless otherwise ordered by the court, or a judge, or by consent.

37. Countermand of notice of inquiry shall be given four days before the day of inquiry mentioned in the notice, unless short notice of inquiry has been given, and then two days before such day, unless otherwise ordered by the court, or a judge, or by consent. Ante, p. 90.

This rule, it will be observed, enacts as to countermand of notice of *Inquiry* the provisions of the C. L. P. A. 1852, s. 98 (*ante*, p. 90), which has reference only to countermand of notice of *trial*.

38. On a replication or other pleading denying the existence of a record pleaded by the defendant, a rule for the defendant to produce the record shall not be necessary or used, and instead thereof a four days' notice shall be substituted, requiring the defendant to produce the record, otherwise judgment.

39. The costs of the day for not proceeding to trial or to execute a writ of inquiry may be obtained by a side-bar rule, on the usual affidavit.

It would seem that a defendant, who seeks to take advantage of the non-appearance of the plaintiff at the trial, should take care that the jury are sworn; and should then proceed to have the plaintiff nonsuited, instead of letting the cause be struck out (*Warne* v. *Hill*, 7 C. B. N. S. 726; L. J. 29, C. P. 201; *Leech* v. *Gibson*, 10 W. R. 354, Ex. H. T. 1862; *Smith* v. *Marshall*, L. J. 33, Q. B. 332).

40. In all cases where the plaintiff's pleading is in denial of the pleading of the defendant, without joining issue, the plaintiff's attorney may give notice of trial at the time of delivering his replication or other subsequent pleading; and in case issue shall afterwards be joined, such notice shall be available; but if issue be not joined on such replication, or other subsequent pleading, and the plaintiff shall sign judgment for want thereof, and forthwith give notice of executing a writ of inquiry, such notice shall operate from the time that notice of trial was given as aforesaid; and in all cases where the defendant demurs to the plaintiff's declaration, replication, or other subsequent pleading, the defendant's attorney, or the defendant, if he plead in person, shall be obliged to

accept notice of executing a writ of inquiry on the back of the joinder in demurrer; and in case the defendant pleads a plea in bar or rejoinder, &c., to which the plaintiff demurs, the defendant's attorney, or the defendant, if he plead in person, shall be obliged to accept notice of executing a writ of inquiry on the back of such demurrer.

This should be read with C. L. P. A. 1852, ss. 77, 79, and 89 (*ante*, pp. 78, 83).

41. Notice of a trial at bar shall be given to the Masters of the court before giving notice of trial to the party.

42. No trial by proviso shall be allowed in the same term in which the default of the plaintiff has been made, and no rule for a trial by proviso shall be necessary.

43. All causes to be entered for trial in London and Middlesex shall be entered as follows; that is to say, if notice of trial shall be given for any sitting within term, two days before the day of sitting; and if for a sitting after term, before eight o'clock, P.M., of the day before the first day of such sitting; and if the same shall not be so entered for such sittings respectively, a *ne recipiatur* may be entered.

The associate, at the request of the defendant or his attorney, will enter a *ne recipiatur*.

Causes are frequently entered for trial before the issue is complete. *Semble*, this is a mere irregularity.

As to going to trial with an incomplete issue, see *Berresford* v. *Geddes* (L. R. 2 C. P. 285).

JURY AND VIEW.

Ante, pp. 97, 98.

44. No rule for a special jury shall be granted on behalf of any defendant (or plaintiff in replevin), except on an affidavit, either stating that no notice of trial has been given, or if it has been given, then stating the day for which such notice has been given; and in the latter case, no such rule is to be granted unless such application is made for it more than six days before that day; provided that a judge may, on summons, order a rule for a special jury to be drawn up at any time.

The court has no power to grant a rule for a special jury before issue joined, even where, in consequence of the defend-

ant's being under terms to take short notice of trial, he would not, if he waited till joinder, be in time to move for a special jury a sufficient number of days before the trial; the proviso at the end of this rule being limited to the six days' notice (*Dresser* v. *Norman*, 6 C. B. N. S. 427).

In a case in which Keating, J. had refused to grant a special jury at the instance of the defendants, though there had been no laches on their part, the court, in the absence of special grounds for so doing, declined to interfere with his discretion (*Smith* v. *London & S. Katharine's Dock Company*, L. R. 2 C. P. 630).

45. No cause shall be tried by a special jury in Middlesex or London, unless the rule for such special jury be served, and the cause marked in the Associate's book as a special jury cause, on or before the day preceding the day appointed in Middlesex and London respectively for the trial of special juries. Ante, pp. 97—99.

46. There shall be no rule for the sheriff to return a good jury upon a writ of inquiry, but an order shall be made by a judge upon summons for that purpose.

47. Sheriffs, other than the sheriffs of London and Middlesex, shall, seven days before the commission day, make and keep at their offices, for inspection, a printed copy of the panel of the special jurymen to try the special jury causes at the assizes, as directed by the Common Law Procedure Act, 1852; but such special jury need not be summoned except notice be given as provided for by the 112th section of the said act. Ante, p. 99.

48. The rule for a view may in all cases be drawn up by the officer of the court, on the application of the party, without a motion for that purpose. Ante, p. 100.

49. Upon any application for a view there shall be an affidavit stating the place at which the view is to be made, and the distance thereof from the office of the under sheriff, and the sum to be deposited in the hand of the under sheriff shall be 10*l.* in case of a common jury, and 16*l.* in case of a special jury, if such distance do not exceed five miles, and 15*l.* in case of a common jury, and 21*l.* in case of a special jury, if it be above five miles. And if such sum shall be more than sufficient to pay the expenses of the view, the surplus shall forthwith be returned to the attorney of the party who obtained the view; and if such sum shall not be sufficient to pay such expenses the deficiency shall forthwith be paid by such attorney

to the under sheriff; and the under sheriff shall pay and account for the money so deposited according to the scale following—that is to say:

	£	s.	d.
For travelling expenses to the under sheriff, showers, and jurymen, expenses actually paid, if reasonable.			
Fee to the under sheriff, when the distance does not exceed five miles from his office	1	1	0
Where such distance exceeds five miles	2	2	0
And in case he shall be necessarily absent more than one day, then for each day after the first a further fee of.....	1	1	0
Fee to each of the showers the same as the under sheriff, calculating the distance from their respective places of abode.			
Fee to each common juryman, per diem	0	5	0
For each special juryman, per diem	1	1	0
Allowance for refreshment to the under sheriff, showers, and jurymen, whether common or special, each per diem....	0	5	0
To the bailiff for summoning each juryman whose residence is not more than five miles distant from the office of the under sheriff.....	0	2	6
And to each whose residence does exceed five miles of such distance.....	0	5	0

New Trials, Motions in Arrest of Judgment, and Judgment non obstante veredicto.

50. No motion for a new trial, or to enter verdict or nonsuit, motion in arrest of judgment, or for judgment *non obstante veredicto*, shall be allowed after the expiration of four days from the day of trial, nor in any case after the expiration of the term, if the cause be tried in term, or after the expiration of the first four days of the ensuing term when the cause is tried out of term, unless entered in a list of postponed motions by leave of the court.

See *Ellaby* v. *Moore* (13 C. B. 907; L. J. 22, C. P. 253), and *Pain* v. *Terry* (L. J. 34, Ex. 224). An extension of time may be granted, as where an under-sheriff refused to furnish his notes of a trial before him (*Thomas* v. *Edwards*, 1 Cr. M. & R. 352): see also *Harris* v. *G. N. R. Company* (11 C. B. 542). Where a rule *nisi* has been obtained in the wrong court, and the error has not

been discovered in time to move in the proper court within the four days, this rule may be waived (*Hawker* v. *Seale*, 17 C. B. 595).

This rule applied to a trial under a writ of trial without reference to the time of the return of the writ (*Carlin* v. *Parsons*, L. R. 2 C. P. 466, n.); it applies to a trial in the county court under 19 & 20 Vict. c. 108, s. 26 (*ante*, p. 361), without reference to the time of filing the registrar's certificate in the master's office (*Copcutt* v. *Great Western Railway Company*, L. R. 2 C. P. 465).

51. No suitor who appears in person shall be at liberty to set down any motion in such list of postponed motions, without the express leave of the court.

52. No affidavit shall be used in support of a motion for a new trial in any case, unless such affidavit shall have been made within the time limited for the making such motion, without the special permission of the court for that purpose.

Gibbs v. *Tunnaley* (1 C. B. 640).

53. If such motion as above-mentioned be entered in such list of postponed motions, or if such motion be postponed by leave of the court in the case of a cause tried in term, the attorney who has instructed counsel to make the motion shall give notice of it to the attorney of the opposite party, otherwise judgment signed on behalf of the opposite party shall be deemed regular, and every suitor who appears in person shall give a similar notice.

Doe d. *Whitty* v. *Carr* (16 Q. B. 117; L. J. 20, Q. B. 83).

54. If a new trial be granted without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeed on the second.

See, where verdict against evidence, C. L. P. A. 1854, s. 44 (*ante*, p. 244).

See, as to application of this rule in cases within 8 & 9 Vict. c. 118, s. 56 (General Inclosure Act), *Romney* (*Earl of*) v. *Inclosure Commissioners* (2 C. L. R. 1651; Q. B. T. T. 1854).

JUDGMENT.

55. No rule for judgment shall be necessary; and after the return of a writ of inquiry judgment may Ante, p. 107.

be signed at the expiration of four days from such return.

56. All judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day; but it shall be competent for the court or a judge to order a judgment to be entered *nunc pro tunc*.

See C. L. P. A. 1852, s. 139, n. (*ante*, pp. 119, 120).
See as to division of day, *Wright* v. *Mills* (4 H. & N. 488; L. J. 28, Ex. 223).

Ante, pp. 106, 107.

57. Where a plaintiff or defendant has obtained a verdict in term, or in case a plaintiff has been non-suited at the trial in or out of term, judgment may be signed and execution issued thereon in fourteen days, unless the judge who tries the cause, or some other judge, or the court, shall order execution to issue at an earlier or later period, with or without terms.

The provisions of the C. L. P. A. 1852, s. 120 (*ante*, p. 106), are confined to execution in causes *out of term*. This rule, in effect, extends that enactment to execution in causes tried *in term*, and on judgments of nonsuit.

Ante, p. 92.

58. Where issue shall be joined in any cause which is ordered to be tried before the sheriff or a judge of an inferior court of record, the defendant may, at the time when, according to the 101st section of the Common Law Procedure Act, 1852, a defendant might give notice to the plaintiff to bring on an issue to be tried, give twenty days' notice to the plaintiff to bring on the issue to be tried before such sheriff or judge at the court to be holden next after the expiration of such twenty days; and if the plaintiff neglects to give notice of trial before such sheriff or judge, or to proceed to trial in pursuance thereof, the defendant may proceed as provided for by the said 101st section.

This rule made the provisions of C. L. P. A. 1852, s. 101 (*ante*, p. 92), applicable to writs of trial.

Costs; setting off Damages or Costs.

59. One day's notice of taxing costs, together with a copy of the bill of costs and affidavit of increase (if any), shall be given by the attorney of the party

whose costs are to be taxed to the other party, or his attorney, in all cases where a notice to tax is necessary.

C. L. P. A. 1852, s. 206, n. (*ante*, p. 159).

60. One appointment only shall be deemed necessary for proceeding in the taxation of costs or of an attorney's bill.

61. Notice of taxing costs shall not be necessary in any case where the defendant has not appeared in person, or by his attorney or guardian.

62. When issues in law and fact are raised, the costs of the several issues both in law and fact will follow the finding or judgment, and if the party entitled to the general costs of the cause obtain a verdict on any material issue, he will also be entitled to the general costs of the trial; but if no material issue in fact be found for the party otherwise entitled to the general costs of the cause, the costs of the trial shall be allowed to the opposite party.

Callander v. *Howard* (10 C. B. 302; L. J. 20, C. P. 66).
Partridge v. *Gardner* (6 Exch. 621).
Under the 3 & 4 Will. 4, c. 42, s. 84, the party who is successful upon a demurrer is entitled to a judgment for his costs, irrespective of the termination of the suit; and where such judgment had been given for the plaintiff prior to the trial of the issues in fact, the withdrawal of a juror, with an agreement that no further action was to be brought, was held to be no waiver of the plaintiff's right to these costs (*Bentley* v. *Dawes*, 10 Exch. 347).
It has been doubted whether this rule applies where a party has succeeded at the trial upon an issue which was afterwards held bad upon demurrer (*Oxenham* v. *Smythe*, 10 W. R. 649, Ex. E. T. 1862).

63. No set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought; provided, nevertheless, that interlocutory costs in the same suit, awarded to the adverse party, may be deducted.

As to setting-off interlocutory costs, see *Melville* v. *Leeson* (L. J. 27, Q. B. 318).
The cases relating to the attorney's lien for costs are collected in *Dunn* v. *West* (10 C. B. 420; L. J. 20, C. P. 1); *Scott* v. *De Richebourg* (11 C. B. 447; L. J. 20, C. P. 263); *Lloyd* v. *Mansell* (L. J. 22, Q. B. 110); *Simpson* v. *Lamb* (7 E. & B. 84); and *Bruns-*

don v. *Allard* (2 E. & E. 19; L. J. 28, Q. B. 306). See also in Chancery, *Shaw* v. *Neale* (20 Beav. 157; L. J. 24, Ch. 563); *Sympson* v. *Prothero* (L. J. 26, Ch. 671); *Verity* v. *Wyld* (4 Drew. 427; L. J. 28, Ch. 561); and, where attorney in prison, *Re Williams* (28 Beav.; L. J. 30, Ch. 609).

See, where interest in suit has been assigned, *Standeven* v. *Murgatroyd* (L. J. 27, Ex. 425).

See as to distributable costs, where costs abide event of award, *Re Marsack and Webber* (2 E. & E. 637; L. J. 29, Q. B. 109).

See 23 & 24 Vict. c. 127, s. 28, cited *ante*, p. 267, n.

Error.

Error in fact.

Ante, pp. 134, 135.

64. Within eight days after the filing with the Master of the memorandum of error in fact, required by the Common Law Procedure Act, 1852, the plaintiff in error shall assign error; and in default, the defendant in error, his executors or administrators, shall be entitled to sign judgment of *non pros.*

65. No rule to plead to assignment of error in fact, or any other pleadings in error, shall be necessary, but either party may give to the opposite party a notice to answer such pleadings within four days, otherwise judgment; which notice may be delivered separately, or indorsed on the pleading.

66. Notice of trial, and all other proceedings thereon, shall be the same as in issues joined in an ordinary action.

Error in law.

Ante, pp. 127—131.

67. After the suggestion of error in law, alleged and denied as prescribed by the Common Law Procedure Act, 1852, is entered, either party may set down the case for argument, and forthwith give notice in writing to the opposite party, and proceed to the argument thereof as on a demurrer, without any rule or motion for a *concilium.*

Ante, p. 133.

68. Four clear days before the day appointed for argument, the plaintiff in error shall deliver copies of the judgment roll of the court below to the judges of the Queen's Bench on error from the Common Pleas or Exchequer, and to the judges of the Common Pleas on error from the Queen's Bench; and the defendant in error shall deliver copies thereof to the other judges of the Court of Exchequer Chamber before whom the

case is to be heard, and in default by either party, the other party may on the following day deliver such books as ought to have been delivered by the party making default, and the party making default shall not be heard until he shall have paid for such copies, or deposited with the Master a sufficient sum to pay for such copies.

69. The costs of proceedings in error shall be taxed and allowed as costs in the cause. Ante, p. 133.

EXECUTION.

70. It shall not be necessary, before issuing execution upon any judgment whatever, to enter the proceedings upon any roll. Ante, pp. 106, 107, 159.

The provisions of C. L. P. A. 1852, s. 206 (*ante*, p. 159), apply only to judgments *under the authority of that act*; this rule extends to *all* judgments.

71. No writ of execution shall be issued till the judgment paper, postea, or inquisition, as the case may be, has been seen by the proper officer, nor shall any writ of execution be issued without a *præcipe* being filed with the proper officer.

72. Every writ of execution shall bear date on the day on which the same shall be issued, and shall be tested in the name of the Lord Chief Justice or of the Lord Chief Baron of the court from which the same shall issue, or in case of a vacancy of such office, then in the name of the senior puisne judge of the said court, and may be made returnable on a day certain in term.

73. Every writ of execution shall be indorsed with the name and place of abode or office of business of the attorney actually suing out the same, and in case such attorney shall not be attorney of the court in which the same is sued out, then also with the name and place of abode or office of business of the attorney of such court in whose name such writ shall be taken out; and when the attorney actually suing out any writ shall sue out the same as agent for an attorney in the country, the name and place of abode of such attorney in the country shall also be indorsed upon the said writ; and in case no attorney shall be em-

ployed to issue the writ, then it shall be indorsed, with a memorandum expressing that the same has been sued out by the plaintiff or defendant in person, as the case may be, mentioning the city, town or parish, and also the name of the hamlet, street, and number of the house of such plaintiff or defendant's residence, if any such there be.

74. Writs of *capias ad satisfaciendum* for the purposes of outlawry on final process, or to fix bail, must be made returnable on a day certain in term, and may be so returnable on any day in term, and it shall be sufficient for either purpose that there be eight days between the *teste* and return.

But see C. L. P. A. 1854, s. 90 (*ante*, p. 286).
See as to former practice, *Kemp* v. *Hyslop* (1 M. & W. 58).

75. A writ of *capias ad satisfaciendum* to fix bail shall have eight days between the *teste* and return, and must, in London or Middlesex, be entered four clear days in the public book at the sheriff's office.

76. Every writ of execution shall be indorsed with a direction to the sheriff, or other officer or person to whom the writ is directed, to levy the money really due and payable and sought to be recovered, under the judgment, stating the amount, and also to levy interest thereon, if sought to be recovered, at the rate of four pounds per centum per annum from the time when the judgment was entered up, or if it was entered up before the 1st of October, 1838, then from that day; provided that in cases where there is an agreement between the parties that more than four per cent. interest shall be secured by the judgment, then the indorsement may be accordingly to levy the amount of interest so agreed.

77. In cases of an assessment of further damages, pursuant to the statute of 8 & 9 Will. 3, it shall be stated in the body of the writ of execution that the sheriff, or other officer or person to whom the writ is directed, is to levy interest on the damages assessed and costs taxed in that behalf, at the rate of four pounds per centum per annum, from the day on which execution was awarded, unless execution was awarded before the 1st of October, 1838, and in that case from that day.

Revivor and Scire Facias.

78. A plaintiff shall not be allowed a rule to quash his own writ of *scire facias* or revivor, after a defendant has appeared, except on payment of costs. Ante, p. 114.

The rule to quash a *sci. fa.* is a rule *nisi* only (*Ade* v. *Stubbs*, 4 Dowl. 282).

Audita Querela.

79. No writ of *auditâ querelâ* shall be allowed unless by rule of court or order of a judge.

The application should be made upon affidavit (*Dearie* v. *Ker*, 4 Exch. 82).

Entry of Satisfaction on Roll.

80. In order to acknowledge satisfaction of a judgment it shall be requisite only to produce a satisfaction piece, in form as hereinafter mentioned; and such satisfaction piece shall be signed by the party or parties acknowledging the same, or their personal representatives; and such signature or signatures shall be witnessed by a practising attorney of one of the courts of Westminster expressly named by him or them, and attending at his or their request, to inform him or them of the nature and effect of such satisfaction piece before the same is signed, and which attorney shall declare himself, in the attestation thereto, to be the attorney for the person or persons so signing the same, and state he is witness as such attorney (provided that a judge at chambers may make an order dispensing with such signature under special circumstances, if he thinks fit); and in cases where the satisfaction piece is signed by the personal representative of a deceased, his representative character shall be proved in such manner as the Master may direct.

Form of Satisfaction Piece.

In the

Monday, the day of A.D. 186 .

" *to wit.—Satisfaction is acknowledged between plaintiff, and defendant, in an action for and : And do hereby expressly nominate and appoint , attorney-at-law, to witness and attest execution of this acknowledgment of satisfaction.*"

"Judgment entered on the day of in the year of our Lord 186 *Roll No.*

Signed by the said in the presence of me of one of the attorneys of the court of at Westminster. And I hereby declare myself to be attorney for and on behalf of the said expressly named by h and attending at h request to inform h of the nature and effect of this acknowledgment of satisfaction (which I accordingly did before the same was signed by h). And I also declare that I subscribe my name hereto as such attorney.

Signature.

the above-named plaintiff.

Date.

See further, R. G. E. T. 1857, *post.*

Where a judgment is satisfied, the judgment creditor may be compelled to execute a satisfaction piece.

Bailable Proceedings, Bail, and Bail in Error.

81. The sheriff, or other officer or person to whom any writ of *capias* shall be directed, or who shall have the execution and return thereof, shall, within six days at least after the execution thereof, indorse on such writ the true day of the execution thereof.

82. Where the defendant is described, in the writ of *capias* or affidavit to hold to bail, by initials, or by a wrong name, or without a christian name, the defendant shall not be discharged out of custody, or the bail-bond delivered up to be cancelled, on motion for that purpose, if it shall appear to the court that due diligence has been used to obtain knowledge of the proper name.

83. An action may be brought upon a bail-bond by the sheriff himself in any court.

The assignee must still bring his action in that court from which the process issued upon which the bond was taken.

84. In all cases where the bail-bond shall be directed to stand as a security, the plaintiff shall be at liberty to sign judgment upon it.

85. Proceedings on the bail-bond may be stayed on payment of costs in one action, unless sufficient reason be shown for proceeding in more.

Where several actions were proceeded in to verdict, it was held too late to apply to stay the proceedings on payment of the costs of one only (*Johnson* v. *Macdonald*, 2 Dowl. 44).

See as to conditional relief of bail "on payment of costs" *Jallicks* v. *Costar* (L. J. 28, Ex. 209).

86. When bail to the sheriff become bail to the action, the plaintiff may except to them, though he has taken an assignment of the bail-bond.

87. A plaintiff shall not be at liberty to proceed on the bail-bond pending a rule to bring in the body of the defendant.

Whittle v. *Oldaker* (7 B. & C. 478).

88. No rule shall be drawn up for setting aside an attachment, regularly obtained against a sheriff, for not bringing in the body, or for staying proceedings regularly commenced on the assignment of any bail-bond, unless the application for such rule shall, if made on the part of the original defendant, be grounded on an affidavit of merits, or, if made on the part of the sheriff, or bail, or any officer of the sheriff, be grounded on an affidavit showing that such application is really and truly made on the part of the sheriff, or bail, or officer of the sheriff, as the case may be, at his or their own expense, and for his or their indemnity only, and without collusion with the original defendant.

89. Whenever a plaintiff shall rule the sheriff on a return of *cepi corpus* to bring in the body, the defendant shall be at liberty to put in and perfect bail at any time before the expiration of such rule; and a plaintiff, having so ruled the sheriff, shall not proceed on any assignment of the bail-bond, until the time has expired to bring in the body as aforesaid.

90. In case a rule for returning a writ of *capias* shall expire in vacation, and the sheriff or other officer having the return of such writ shall return *cepi corpus* thereon, a rule may thereupon issue, requiring the sheriff or other officer, within the like number of days after the service of such rule as by the practice of the court is prescribed with respect to rules to bring in the body issued in term, to bring the defendant into court, by forthwith putting in and perfecting bail above to the action; and if the sheriff or other officer shall not duly obey such rule, an attachment shall issue in the following term for disobedience of such

rule, whether the bail shall or shall not have been put in and perfected in the meantime.

91. Notice of more bail than two shall be deemed irregular unless by order of the court or a judge.

92. The bail, of whom notice shall be given, shall not be changed without leave of the court or a judge.

93. No person or persons shall be permitted to justify himself or themselves as good and sufficient bail for any defendant or defendants if such person or persons shall have been indemnified for so doing by the attorney or attorneys concerned for any such defendant or defendants.

94. If any person put in as bail to the action, except for the purpose of rendering only, be a practising attorney, or clerk to a practising attorney, or a sheriff's officer, bailiff, or person concerned in the execution of process, the plaintiff may treat the bail as a nullity, and sue upon the bail-bond as soon as the time for putting in bail has expired, unless good bail be duly put in in the meantime.

95. In the case of country bail, the bail-piece shall be transmitted and filed within eight days.

96. A defendant may justify bail at the same time at which they are put in, upon giving four days' notice for that purpose, before 11 o'clock in the morning, and exclusive of Sunday. If the plaintiff is desirous of time to inquire after the bail, and shall give one day's notice thereof as aforesaid to the defendant, his attorney or agent, as the case may be, before the time appointed for justification, stating therein what further time is required, such time not to exceed three days, then (unless the court or a judge shall otherwise order) the time for putting in and justifying bail shall be postponed accordingly, and all proceedings shall be stayed in the meantime.

97. Every notice of bail shall, in addition to the descriptions of the bail, mention the street or place, and number (if any), where each of the bail resides, and all the streets or places, and numbers (if any), in which each of them has been resident at any time

within the last six months, and whether he is a housekeeper or freeholder.

98. If the notice of bail shall be accompanied by an affidavit of each of the bail, according to the following form, and if the plaintiff afterwards except to such bail, he shall, if such bail are allowed, pay the costs of justification; and if such bail are rejected, the defendant shall pay the costs of opposition, unless the court or a judge thereof shall otherwise order.

Form of Affidavit of Justification of Bail.

In the Queen's Bench [or "*Common Pleas*," or "*Exchequer of Pleas*," as the case may be].

Between A. B. *Plaintiff, and* C. D. *Defendant.*

B. B., *one of the bail for the above-named defendant, maketh oath, and saith that he is a housekeeper* [or *freeholder*, as the case may be], *residing at* [describing particularly the street or place, and number, if any]: *that he is worth property to the amount of £* [the amount required by the practice of the courts] *over and above what will pay all his just debts* [if bail in any other action add "*and every other sum for which he is now bail*"]; *that he is not bail for any defendant except in this action* [or, if bail in any other action or actions, add "*except for* C. D. *at the suit of* E. F., *in the court of in the sum of £ , for* G. H. *at the suit of* I. K. *in the court of in the sum of £* ," specifying the several actions, with the courts in which they are brought, and the sums in which the deponent is bail]; *that the deponent's property, to the amount of the said sum of £* [if bail in any other action or actions, here add "*and of all other sums for which he is now bail as aforesaid*"], *consists of* [here specify the nature and value of the property in respect of which the bail proposes to justify as follows: "*stock in trade, in his business of , carried on by him at , of the value of £ ; of good book debts owing to him to the amount of £ ; of furniture in his house at of the value of £ ; of a freehold or leasehold farm of the value of £ , situate at , occupied by , or of a dwelling-house of the value of £ , situate at , occupied by* ;" or of other property, particularizing each description of property with the value thereof]; *and that the deponent hath for the last six months resided at* [describing the place or places of such residence].

Sworn [&c. as usual].

See as to form, R. G. M. V. 1852, r. 2, *post.*

99. If the plaintiff shall not give one day's notice of exception to the bail by whom such affidavit shall have been made, the recognizance of such bail may be taken out of court without other justification than such affidavit.

100. Where notice of bail shall not be accompanied by such affidavit, and in bail in error, the plaintiff may

except thereto within twenty days next after the putting in of such bail, and notice thereof given in writing to the plaintiff or his attorney, or where special bail is put in before any commissioner the plaintiff may except thereto within twenty days next after the bail-piece is transmitted and notice thereof given as aforesaid; and no exception to bail shall be admitted after the time hereinbefore limited.

101. Affidavits of justification shall be deemed insufficient unless they state that each person justifying is worth double the amount sworn to over and above what will pay his just debts, and over and above every other sum for which he is then bail, except when the sum sworn to exceeds 1,000*l.*, when it shall be sufficient for the bail to justify in 1,000*l.*, beyond the sum sworn to.

102. It shall be sufficient in all cases, if notice of justification of bail be given two days before the time of justification.

103. In all cases bail either to the action or in error shall be justified, when required, within four days after exception, before a judge at chambers, both in term and vacation.

104. Bail, though rejected, shall be allowed to render the principal without entering into a fresh recognizance.

105. Bail shall be at liberty to render the principal at any time during the last day for rendering, so as they make such render before the prison doors are closed for the night.

106. On application by defendant or his bail, or either of them, for an order to render a defendant to a county gaol, it shall be specified on whose behalf such application shall be made, the state of the proceedings in the cause, for what amount the defendant was held to bail, and by the sheriff of what county he was arrested, which facts shall be stated in the order; and that on such order being lodged with the gaoler of the county gaol in which such defendant was so arrested, the defendant may be rendered to his custody in discharge of the bail; and that on such lodgment and render a notice thereof, and of the defend-

ant's being actually in custody thereon, in writing, signed by the defendant or his bail, or either of them, or the attorney or agent of any or either of them, shall be delivered to the plaintiff's attorney or agent, and thereupon the bail for the said defendant shall be wholly exonerated, without entering any *exoneretur*.

107. If a defendant shall be in custody of the gaoler of any county gaol, by virtue of any process issued out of any of the said courts, he may be rendered in discharge of his bail in any action depending in the said court in like manner as is last hereinbefore provided, and thereupon the bail shall be wholly exonerated without entering any *exoneretur*.

108. Where the plaintiff proceeds by action on the recognizance of bail, the bail shall be at liberty to render their principal at any time within the space of eight days next after the service of the process upon them, but not at any later period; and notice thereof given, the proceedings shall be stayed upon payment of the costs of the writ and service thereof only.

109. Bail shall only be liable to the sum sworn to by the affidavit of debt and the costs of suit, not exceeding in the whole the amount of their recognizance.

The meaning of this rule is that bail are only liable to the amount of the debt mentioned in the order to hold to bail and indorsed on the capias, and costs (*Jonas* v. *Tepper*, 1 E. & E. 327; L. J. 28, Q. B. 85).

See also *Vansandau* v. *Nash* (2 Dowl. 767).

Bail in error.

110. To entitle bail to a stay of proceedings pending a writ of error, the application must be made before the time to surrender is out.

111. Whenever two or more notices of justification of bail shall have been given before the notice on which bail shall appear to justify, no bail shall be permitted to justify without first paying (or securing to the satisfaction of the plaintiff, his attorney or agent) the reasonable costs incurred by such prior notices, although the names of the persons intended to justify, or any of them, may not have been changed, and whether the bail mentioned in any such prior notice shall not have appeared, or shall have been rejected.

EJECTMENT.

Ante, p. 147. 112. No judgment in ejectment for want of appearance or defence, whether limited or otherwise, shall be signed without first filing an affidavit of the service of the writ, according to the Common Law Procedure Act, 1852, and a copy thereof, or, where personal service has not been effected, without first obtaining a judge's order or a rule of court authorizing the signing such judgment; which said rule or order, or a duplicate thereof, shall be filed, together with a copy of the writ.

Ante, p. 145. 113. Where a person not named in the writ in ejectment has obtained leave of the court or a judge to appear and defend, he shall enter an appearance according to the Common Law Procedure Act, 1852, entitled in the action against the party or parties named in the writ as defendant or defendants, and shall forthwith give notice of such appearance to the plaintiff's attorney, or to the plaintiff, if he sues in person.

Ante, p. 150. 114. If the plaintiff in ejectment appears at the trial, and the defendant does not appear, the defendant shall be taken to have admitted the plaintiff's title, and the verdict shall be entered for the plaintiff, without producing any evidence, and the plaintiff shall have judgment for his costs of suit as in other cases.

See Pl. R. T. T. 1853, r. 29, *post.*

CAUSES REMOVED FROM INFERIOR COURTS.

115. Rules to appear in causes removed from inferior courts shall in all cases be a four-day rule, both in term and vacation.

116. In cases of removal of causes from inferior courts by *habeas corpus*, where bail is required to be put in on behalf of the defendant, the same practice shall be used, as near as may be, as in putting in bail to an ordinary action, and, in the event of no bail being put in within eight days after the *habeas corpus* allowed, a *procedendo* may issue.

117. If a cause be removed from an inferior court having jurisdiction of the cause, the costs in the court below shall be costs in the cause.

PENAL ACTIONS, COMPOUNDING OF.

118. Leave to compound a penal action shall not be given in cases where part of the penalty goes to the Crown, unless notice shall have been given to the proper officer; but in other cases it may.

The application for leave to compound cannot be made till after plea pleaded (*Rex* v. *Collier*, 2 Dowl. 581).

119. The rule for compounding any *qui tam* action shall express therein that the defendant thereby undertakes to pay the sum for which the court has given him leave to compound such action.

120. When leave is given by the Court of Queen's Bench to compound a penal action, the Queen's half of the composition shall be paid into the hands of the Master of the Crown-office for the use of Her Majesty.

PAUPERS, ACTIONS BY.

121. No person shall be permitted to sue *in formâ pauperis* unless the case laid before counsel for his opinion, and his opinion thereon, with an affidavit of the party or his attorney that the same case contains a full and true statement of all the material facts, to the best of his knowledge and belief, shall be produced before the court or judge to whom application may be made; and no fees shall be payable by a pauper to his counsel and attorney, nor at the offices of the Masters, or associates, or at the judge's chambers or elsewhere, by reason of a verdict being found for such pauper exceeding five pounds.

The former part of this rule was framed, it is said, to check the too great facility with which certificates were obtained from counsel, and the latter part, to prevent speculation in such actions.

See hereon *Dooly* v. *G. N. R. Company* (4 E. & B. 341, & *S. C.* 2 E. & E. 576. S. C. *sub nom.*; *Dewley* v. *G. N. R. Company*, L. J. 24, Q. B. 25; and *S. C.* L. J. 29, Q. B. 83); and as to the effect of dispaupering a plaintiff, *Holmes* v. *Penney* (9 Exch. 584).

See also Pl. R. T. T. 1853, r. 28, *post*; and *Seymour* v. *Maddox* (1 L. M. & P. 543; L. J. 19, Q. B. 525).

122. Where a pauper omits to proceed to trial pursuant to notice, he may be called upon by a rule to show cause why he should not pay costs, though he Ante, p. 89.

has not been dispaupered, and why all further proceedings should not be stayed until such costs shall be paid.

See *Doe* d. *Linsey* v. *Edwards* (2 Dowl. 468, 471); *Tempany* v. *Rigby* (10 Exch. 476).

PRISONERS, AND PROCEEDINGS AGAINST.

123. Every rule or order of a judge directing the discharge of a defendant out of custody upon special bail being put in and perfected, shall also direct a *supersedeas* to issue forthwith where defendant is in a county gaol.

124. The plaintiff shall proceed to trial, or final judgment, against a prisoner in the term next after issue is joined, or at the sittings or assizes next after such term, unless the court or a judge shall otherwise order, and shall cause the defendant to be charged in execution within the term next after such trial or judgment.

125. The keeper of the Queen's prison shall present to the judges of the courts in their respective chambers at Westminster, within the first four days of every term, a list of all such prisoners as are supersedeable, showing as to what actions and on what account they are so, and as to what actions (if any) they still remain not supersedeable.

Siggers v. *Brett* (5 B. & A. 455).

126. If, by reason of any writ of error, special order of the court, agreement of parties, or other special matter, any person detained in the actual custody of the keeper of the Queen's prison be not entitled to a supersedeas or discharge for want of proceeding to trial or judgment, or charging in execution, within the time prescribed, then and in every such case the plaintiff or plaintiffs at whose suit such prisoner shall be so detained in custody shall with all convenient speed give notice in writing of such writ of error, special order, agreement, or other special matter, to the keeper, upon pain of losing the right to detain such prisoner in custody by reason of such special matter; and the keeper shall forthwith after the receipt of such notice cause the matter thereof to be entered in the books of the prison, and shall

also present to the judges of the respective courts, from time to time, a list of the prisoners to whom such special matter shall relate, showing such special matter, together with the list of the prisoners supersedeable.

127. All prisoners who have been, or shall be, in the custody of the keeper for the space of one calendar month after they are supersedeable, although not superseded, shall be forthwith discharged out of the Queen's prison as to all such actions in which they have been or shall be supersedeable.

128. After notice given to any plaintiff by a prisoner of his intention to apply for his discharge under any act for the relief of insolvent debtors, no such prisoner shall be superseded or discharged out of custody at the suit of such plaintiff, by reason of such plaintiff's forbearing to proceed against him according to the rules and practice of the courts from the time of such notice given, until some rule or order shall be made in the cause in that behalf.

129. A rule or order for the discharge of a prisoner who has been detained in execution a year for a sum under twenty pounds may be made absolute in the first instance, on an affidavit of notice given ten days before the intended application, which notice may be given before the year expires.

48 Geo. 3, c. 123, s. 1.

This rule applies in actions for torts, as well as upon contracts (*Passingham* v. *Witherden*, 2 C. L. R. 777; Bail C. T. T. 1854, *cor* Wightman, J.).

The notice may be given to the executor of a deceased plaintiff (*Cook* v. *Beardsall*, 9 W. R. 790, Ex. T. T. 1861).

It would seem that notice to one of more plaintiffs is sufficient (*Harris and Another* v. *Turtle*, 8 M. & W. 258).

Where due notice has not been given, the rule is *nisi* only, in the first instance (*Doye* v. *Eley*, 3 C. B. N. S. 764).

Sheriffs.—Rules to Return Writs or bring in the Body.

130. All rules upon the sheriffs of London and Middlesex to return writs or to bring in the bodies of defendants shall be four-day rules, and upon other sheriffs eight-day rules.

131. When a rule to return a writ expires in vaca-

tion, the sheriff shall file the writ at the expiration of the rule, or as soon after as the office shall be open; and the officer with whom it is filed shall indorse the day and hour when it was filed.

132. No judge's order shall issue for the return of any writ, or to bring in the body of a defendant, but a side-bar rule shall issue for that purpose in vacation as in term, which shall be of the same force and effect as side-bar rules made for that purpose in term.

133. In case a rule shall issue in vacation, for the return of any writ of *capias*, *ca. sa.*, *fi. fa.*, *elegit*, *habere facias possessionem*, *venditioni exponas*, or other writ of execution, and such rule shall have been duly served, but obedience shall not have been paid thereto, an attachment shall issue for disobedience of such rule, whether the thing required by such rule shall or shall not have been done in the meantime.

134. Where any sheriff, before his going out of office, shall arrest any defendant and take a bail bond and make return of *cepi corpus*, he shall and may within the time allowed by law be called upon to bring in the body by a rule for that purpose, notwithstanding he may be out of office before such rule shall be granted.

Irregularity.

135. No application to set aside process or proceedings for irregularity shall be allowed unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity.

See *ante*, as to irregularity:—In the writ, C. L. P. A. 1852, s. 20 (p. 28); in the pleadings generally, *Ib.* s. 49 (p. 51); in the declaration, *Ib.* s. 59 (p. 59); in the notice to plead, *Ib.* s. 62 (p. 65); in the plea, *Ib.* s. 67 (p. 67); in paying money into court, *Ib.* s. 72 (p. 74); in a demurrer, *Ib.* s. 89 (p. 83); in the notice of trial, *Ib.* s. 97 (p. 90); and in the service of rules and orders, *Ib.* s. 222 (p. 175).

This rule applies in the case of prisoners as well as in other cases (*Claridge* v. *Mackenzie*, 5 M. & G. 251).

136. Where a summons is obtained to set aside proceedings for irregularity, the several objections intended to be insisted upon shall be stated therein.

Ante, p. 29.

137. In all cases where a rule is obtained to show cause why proceedings should not be set aside for irregularity with costs, and such rule is afterwards discharged generally without any special direction upon the matter of costs, it is to be understood as discharged with costs.

AFFIDAVITS.*

138. The addition and true place of abode of every person making an affidavit should be inserted therein. Ante, pp. 20. 21.

139. In every affidavit made by two or more deponents, the names of the several persons making such affidavit shall be written in the jurat.

140. No affidavit shall be read or made use of in any matter depending in court in the jurat of which there shall be any interlineation or erasure. Ante, p. 25.

141. Where any affidavit is sworn before any judge or any commissioner by any person who from his or her signature appears to be illiterate, the judge's clerk or commissioner taking such affidavit shall certify or state in the jurat that the affidavit was read in his presence to the party making the same, and that such party seemed perfectly to understand the same, and also that the said party wrote his or her mark or signature in the presence of the judge's clerk or commissioner taking the said affidavit. Ante, p. 25.

142. No affidavit of the service of process shall be deemed sufficient if sworn before the plaintiff's own attorney or his clerk. Ante, p. 22.

See *Foster* v. *Harvey* (11 W. R. 899; July, 1863, V. C. W.).

143. Where an agent in town, or an attorney in the country, is the attorney on the record, an affidavit sworn before the attorney in the country shall not be received; and an affidavit sworn before an attorney's clerk shall not be received in cases where it would not be receivable if sworn before the attorney himself; but this rule shall not extend to affidavits to hold to bail.

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* See also R. G. M. V. 1854, r. 2, *post*.

Ante, p. 24.

144. An affidavit sworn before a judge of any of the courts shall be received in the court to which such judge belongs, though not entitled of that court, but not in any other court unless entitled of the court in which it is to be used.

145. Where a special time is limited for filing affidavits, no affidavit filed after that time shall be made use of in court or before the Master, unless by leave of a court or a judge.

Ante, p. 26.

146. No rule which the court has granted upon the foundation of any affidavit shall be of any force unless such affidavit shall have been actually made before such rule was moved for, and produced in court at the time of making the motion.

Ante, p. 26.

147. All affidavits used before a judge out of court shall be filed with the Masters of the said courts, and be alphabetically indexed; and such affidavits shall be delivered to the Masters of the respective courts, in order to be filed, ten days next after that on which the matter is disposed of.

148. No commission for taking affidavits shall be issued to any person practising as a conveyancer, unless such person be also an attorney or solicitor of one of the courts at Westminster; and no such commission shall issue without an affidavit made by the person intended to be named therein, that he is not and does not intend to become a practising conveyancer, or that he is an attorney or solicitor duly enrolled in one of the said courts, and hath taken out his certificate for the current year.

Rules,* Summonses, and Orders.

149. Every rule of court shall be dated the day of the week, month and year on which the same is drawn up, without reference to any other time or date.

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* When the courts are equally divided in opinion upon a rule for a new trial, and it consequently drops, neither party is entitled to any costs of the rule (*Dancey* v. *Richardson*, 3 E. & B. 722; L. J. 23, Q. B. 361). But now that an appeal lies upon rules for new trials (C. L. P. A. 1854, ss. 34, 35, *ante*), the courts generally avoid an equal division, by the withdrawal of the judgment of the junior judge (*Bishop* v. *Trustees of the Bedford Charity*, 1 E. & E. 697; L. J. 28, Q. B. 215); but see *Levy* v. *Green* (6 W. R. 209, Q. B. H. T. 1858).

150. Side-bar rules may be obtained on the last as well as on other days in term.

151. A rule may be enlarged, if the court think fit, without notice.

152. All enlarged rules shall be drawn up for the first day in the ensuing term, unless otherwise ordered by the court.

153. It shall not be necessary to issue more than one summons for attendance before a judge upon the same matter, and the party taking out such summons shall be entitled to an order on the return thereof, unless cause is shown to the contrary.

154. An attendance on a summons, or on an appointment before a Master, for half an hour next immediately following the return thereof, shall be deemed a sufficient attendance.

Moyse v. *Dingle* (L. J. 23, Q. B. 305. Bail Court).

155. All written consents upon which orders for signing judgments are obtained shall be preserved in the chambers of the judges of the respective courts.

These consents are not *cognovits* within the 1 & 2 Vict. c. 110, s. 9. See C. L. P. A. 1852, s. 203, and note (*ante*, p. 158).

156. In actions where the defendant has appeared by attorney no such order shall be made unless the consent of the defendant be given by his attorney or agent.

157. Where the defendant has not appeared or has appeared in person, no such order shall be made unless the defendant attends the judge, and gives his consent in person, or unless his written consent be attested by an attorney acting on his behalf, except in a case where the defendant is a barrister, conveyancer, special pleader or attorney.

158. Where a judge's order is made during vacation, it shall not be made a rule of court before the next term.

159. When a judge's order or order of Nisi Prius is made a rule of court, it shall be a part of the rule

that the costs of making the order a rule of court shall be paid by the party against whom the order is made, provided an affidavit be made and filed that the order has been served on the party, his attorney or agent, and disobeyed.

Carter v. *Tonge Burial Board* (5 H. & N. 523; L. J. 29, Ex. 293).

160. Rules to show cause shall be no stay of proceedings unless two days' notice of the motion shall have been served on the opposite party, except in the cases of rules for new trials, or to enter verdict or nonsuit, motion in arrest of judgment, or for judgment *non obstante veredicto*, to set aside award or annuity deed, or to enter a suggestion, or by the special direction of the court.

NOTICES, SERVICE OF, AND OF RULES, PLEADINGS, &c.

161. All notices required by these rules, or by the practice of the court, shall be in writing.

A notice of opposing costs under R. G. E. T. 1857, must be in writing (*Woodward* v. *North*, 5 H. & N. 790).

162. Where the residence of a defendant is unknown, rules, notices, and other proceedings may be stuck up in the office, but not without previous leave of the court or a judge.

163. It shall not be necessary to the regular service of a rule or order, that the original rule or order should be shown, unless sight thereof be demanded, except in cases of attachment.

Service of a notice or a rule, by putting it under the door of an attorney's office, is not good service without some evidence that it has duly come to hand (*Burdett* v. *Lewis*, 7 C. B. N. S. 791). Where the defendant has left the country and not since been heard of, proof that a copy of the rule has been left at his place of residence is good service (*Styrling* v. *Lloyd*, 9 L. T. N. S. 730, H. T. 1864. Bail C. *cor.* Shee, J.).

Repealed. 164. *Service of pleadings, notices, summonses, orders, rules, and other proceedings, shall be made before 7 o'clock, p.m. If made after that hour the service shall be deemed as made on the following day.*

For this rule has been substituted R. G. 8th May, 1856; which see, *post*.

165. The Masters of the several courts shall cause to be kept an alphabetical book, at their offices, to be there inspected, by any attorney or his clerk, without fee or reward, and every attorney practising in the said courts, and residing within ten miles of the General Post-office, shall enter in such book (in alphabetical order) his name and place of business, or some other proper place, within three miles of the said Post-office, where he may be served with pleadings, notices, summonses, orders, rules, and other proceedings; and as often as any such attorney shall change his place of business, or the place where he may be so served as aforesaid, he shall make the like entry thereof in the said book; and all pleadings, notices, summonses, orders, rules, and other proceedings which do not require a personal service, shall be deemed sufficiently served on such attorney if a copy thereof shall be left at the place lastly entered in such book with any person resident at or belonging to such place; and if any such attorney shall neglect to make such entry, the fixing up of any notice, or the copy of any pleadings, notice, summons, order, rule, or other proceeding, for such attorney, in the Masters' offices shall be deemed a sufficient notice.

166. In all cases where a party sues or defends in person, he shall, upon issuing any writ of summons or other proceeding, or entering an appearance, enter in a book to be kept for that purpose at the Masters' office, an address within three miles from the General Post-office, at which all pleadings, notices, summonses, orders, rules, or other proceedings not requiring personal service shall be left; and if such address shall not be entered in the said book, or if such address shall be more than three miles from the General Post-office, then the opposite party shall be at liberty to proceed by sticking up all pleadings, notices, summonses, orders, rules, or other proceedings in the Masters' office without the necessity of any further service. Ante, pp. 4, 36.

The provisions of this rule are supplementary to those of ss. 6 and 30 of the C. L. P. A. 1852 (*ante*, pp. 4, 36). A plaintiff suing in person must now register a place where notices, pleadings, &c., may be left for him.

An infant, suing by his next friend, and who has recovered in an action, is entitled to the costs of an attorney employed to conduct such action for him, although the writ of summons was sued out in person, and the only notice to the defendant of an attorney being employed was the address of the next friend being

at the office of such attorney, as stated, on the back of the declaration, as follows; E. B., next friend, at C.'s, 8, Symond's Inn, Chancery Lane. C. being an attorney. (*Bryant* v. *Wilson*, 3 C. B. N. S. 722.)

167. In all cases where a plaintiff shall have sued out a writ in person, or a defendant shall have appeared in person, and either party shall by an attorney of the court have given notice in writing to the opposite party, or the attorney or agent of such party, of such attorney being authorized to act as attorney for the party on whose behalf such notice is given, all pleadings, notices, summonses, orders, rules, and other proceedings which according to the practice of the courts are to be delivered to or served upon the party on whose behalf such notice is given shall thereafter be delivered to or served upon such attorney.

Attachment.

168. Rules for attachments shall be absolute in the first instance in the two following cases only, viz., first, for nonpayment of costs on a Master's *allocatur;* secondly, against a sheriff for not obeying a rule to return a writ or to bring in the body.

And where a rule of court ordering payment of costs was a rule, making a judge's order, ordering the party to do an act, a rule of court; and the applicant would not abandon the right to apply for an attachment on the other party for disobedience of the order, a rule absolute in the first instance was refused by Crompton, J. (*Crisp* v. *Groombridge*, L. J. 27, Q. B. 183).

Awards and Annuities.

169. Where a rule to show cause is obtained to set aside an award or an annuity, the several objections thereto intended to be insisted upon at the time of moving to make such rule absolute shall be stated in the rule to show cause.

170. Costs may be taxed on an award, notwithstanding the time for setting aside the award has not elapsed.

Miscellaneous.

Ante, p. 87. 171. On a reference to the Master to ascertain the amount for which final judgment is to be signed, the

Master's certificate shall be filed in the office when judgment is signed.

C. L. P. A. 1852, s. 94 (*ante*, p. 87).

172. On every appointment made by the Master, the party on whom the same shall be served shall attend such appointment without waiting for a second, or, in default thereof, the Master may proceed *ex parte* on the first appointment.

173. The Master's offices in the several courts shall be opened in term time, from eleven o'clock in the forenoon till five o'clock in the afternoon, and not in the evening, and in the vacation, from eleven o'clock in the forenoon till three o'clock in the afternoon, except between the 10th day of August and the 24th day of October, when they are to be open from eleven in the morning till two in the afternoon, and except on Good Friday, Easter-eve, Monday and Tuesday in Easter week, Christmas-day, and the three following days, and such of the four following days as may not fall in the time of term, but not otherwise—namely, the Queen's Birthday, the Queen's Accession, Whit Monday and Whit Tuesday, when the offices shall be closed.

See notes to rule 174, *infra*.

174. In all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the court, the same shall be reckoned exclusively of the first day, and inclusively of the last day, unless the last day shall happen to fall on a Sunday, Christmas-day, Good Friday, or a day appointed for a public fast or thanksgiving,* in which case the time shall be reckoned exclusively of that day also.

Where a writ of summons specially indorsed was served on the defendant on a Friday and no appearance was entered on the following Friday, which was Good Friday, a judgment signed when the offices were opened on the Wednesday following was set aside as irregular, because the defendant had under this rule the whole of that Wednesday in which to appear (*Mumford* v. *Hitchcocks*, 14 C. B. N. S. 361, L. J. 32, C. B. 168).

Erle, J., at chambers gave a similar decision in *Lewis* v. *Calor* (1 F. & F. 306, after T. T. 1858), under the Summary Procedure on Bills of Exchange Act, 1856 (*ante*, p. 329).

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* The Queen's birthday is not within this exception, though the offices may be closed on that day (*Wilkinson* v. *Britten*, 1 M. & G. 557).

So in *Hughes* v. *Griffith* (13 C. B. N. S. 324; L. J. 32, C. P. 47), decided on *The Absconding Debtors' Arrest Act* (14 & 15 Vict. c. 52, s. 1), which requires a *capias* to be served on the debtor within seven days of the order for his arrest, and the last of the seven days fell on Good Friday, it was held that the creditor had the following Wednesday on which to serve the *capias*.

It should be observed that a different construction has been put by the court of Queen's Bench on the C. L. P. A. 1852, s. 11, *ante*, p. 9 (*Evans* v. *Jones*, 2 B. & S. 45; S. C. *sub nom. Anon.* L. J. 31, Q. B. 61), and by the B. Court (*Anon.* L. J. 24, Q. B. 23), and a principle similar to the one there laid down has been followed by the Court of Chancery in interpreting the stat. 11 Geo. 4 & 1 Will. 4, c. 36, s. 15, r. 5, in *Flower* v. *Bright* (2 Johns. & H. 590), where Wood, V.-C. held that when the time for doing an act was expressly fixed by statute it could not be enlarged under r. 12 of Order xxxvii of the Consolidated General Orders, which provides for cases where the time for doing an act or taking a proceeding expires on a day on which the offices are closed.

The construction put in this latter case is analogous to that put on the stat. 20 & 21 Vict. c. 43, relating to appeals from magistrates, which by s. 2 enacts, that the appellant shall enter the case at the crown office within three days of his receipt of it from the magistrates. It has been held under this statute that Sunday is to be reckoned as one of the three days, even though it be the last of such three days. (*Peacock* v. *The Queen*, 4 C. B. N. S. 264; L. J. 27, C. P. 224; *Woodhouse* v. *Woods*, L. J. 29, M. C. 149; *Pennell* v. *Uxbridge Churchwardens, &c.*, L. J. 31, M. C. 92; Bail C. *cor.* Blackburn, J.; but see *Meyer* v. *Harding*, L. R. 2 Q. B. 410.)

Where the last of the eight days from the last day for appearance fell on a Sunday, it was held by the Court of Exchequer that this rule did not apply, and that execution might issue under C. L. P. A. 1852, s. 27, on the Monday following (*Rowberry* v. *Morgan*, 9 Ex. 730; L. J. 23, Ex. 191). The distinction between this case and those of *Mumford* v. *Hitchcocks* and *Lewis* v. *Calor*, cited above, seems to be, that in *Rowberry* v. *Morgan* (*ubi supra*), no act remained to be done by the defendant, but the next step, viz., issuing execution, had to be done by the plaintiff, Sunday being a passive day, merely used for the purposes of reckoning, whereas in the other two cases the defendant had to do an act, viz., to appear; but this distinction does not assist in reconciling the case of *Flower* v. *Bright*, and those decided under 20 & 21 Vict. c. 43, s. 2, cited above, with *Mumford* v. *Hitchcocks* and *Lewis* v. *Calor*, nor is it consistent with the cases decided under C. L. P. A. 1852, s. 11 (*ante*, p. 8).

See as to payment under a judge's order, *Morris* v. *Barrett* (7 C. B. N. S. 139; L. J. 29, C. P. 102); see also *Connelly* v. *Bremner* (L. R. 1 C. P. 557), cited *post*, R. G. E. T. 1856.

175. The days between Thursday next before, and the Wednesday next after Easter-day, and Christmas-day, and the three following days, shall not be reckoned or included in any rules, notices or other proceedings, except notices of trial or notices of inquiry.

176. In all causes in which there have been no pro-

ceedings for one year from the last proceeding had, the party, whether plaintiff or defendant, who desires to proceed, shall give a calendar month's notice to the other party of his intention to proceed. The summons of a judge, if no order be made thereupon, shall not be deemed a proceeding within this rule. Notice of trial, though afterwards countermanded, shall be deemed a proceeding within it.

See, under old practice, *Minchiner* v. *Martin* (12 C. B. 455).

FORMS OF PROCEEDINGS.

The forms of proceedings contained in the schedule hereunder may be used in the cases to which they are applicable, with such alterations as the nature of the action, the description of the court in which the action is depending, the character of the parties, or the circumstances of the case, may render necessary; but any variance therefrom, not being in matter of substance, shall not affect their validity or regularity.

SCHEDULE.

1.—Form of an Issue in General.

In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be*].

The day of , in the year of our Lord 18 (*date of declaration.*)

(*The Venue.*)—*A. B.* by *P. A.* his attorney [*or* "in person," *as the case may be, and as in the declaration,*] sues *C. D.*, who has been summoned to answer the said *A. B.*, by virtue of a writ issued on the day of , in the year of our Lord , (*the date of the first writ*) out of Her Majesty's Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be.*] For, [*&c. Copy the declaration from these words to the end, and all the pleadings, with their dates, writing each plea or pleading in a separate paragraph, and numbering the same as in the pleading delivered, and conclude thus:*] Therefore let a jury come, &c.

2.—Form of a Nisi Prius Record.

The Nisi Prius record will be a copy of the issue as delivered in the action. It must be engrossed on parchment, and a more convenient shape than that heretofore in use must be adopted.

3.—Form of a Postea on a Verdict for Plaintiff on all the Issues where the Cause is tried in London or Middlesex, and where the Defendant appears at the Trial.

Afterwards, on the day of , A.D. , (*the first day of the sittings*) at the Guildhall of the City of London [*or* "at Westminster Hall, in the county of Middlesex,"] before the Right Honourable John Lord Campbell, Her Majesty's Chief Justice assigned to hold pleas in the court of our Lady the Queen before the Queen herself, [*or if in the Common Pleas* "before the Right Honourable Sir John Jervis, Knight, Her Majesty's Chief Justice assigned to hold pleas in Her Majesty's Court of the Bench," *or in the Exchequer*, "before the Right Honourable Sir Frederick Pollock, Knight, Chief Baron of Her Majesty's Court of Exchequer,"] come the parties within mentioned by their respective attorneys within mentioned, and a jury of the within county [*or* "city"], being summoned, also come, who, being sworn to try the matters in question between the said parties upon their oath, say, that [*&c. state the affirmative or negative of the issue as it is found for the plaintiff, and in the terms adopted in the pleading.*] [*If there be several issues joined and tried, then say* "as to the first issue within joined upon their oath say that" (*&c. state the affirmative or negative of the issue as found for plaintiff,*) "and as to the second issue within joined, the jury aforesaid upon their oath say, that" (*&c. so proceed to state the finding of the jury on all the issues.*)] [*Conclude with an assessment of the damages, thus:*] And they assess the damages of the plaintiff on occasion of the premises within complained of by him, over and above his costs of suit, to £ , and for those costs to 40*s*. Therefore, &c.

4.—THE LIKE, where the Cause is tried at the Assizes.

Afterwards, on the day of , A.D. (*the commission day of the assizes*), at in the county [*or* "city"] of , before Sir , Knight, and Sir , Knight, Justices of our said Lady the Queen, assigned to take the assizes in and for the within county [*or* "city and county," *or* "town and county," *as the case may be*], come the parties within mentioned by their respective attorneys within mentioned; and a jury of the said county [*or* "city and county," *or* "town and county," *as the case may be*,] being summoned, also come, who, being sworn to try the matters in question between the said parties, upon their oath say that [*&c. state the negative or affirmative of the issue as it is found for the plaintiff, and in the terms adopted by the pleading.*] [*If there be several issues joined and tried, then say* "as to the first issue within joined, upon their oath, say, that" (*&c. state the affirmative or negative of the issue as it is found for the plaintiff*), "and as to the second issue within joined, the jury aforesaid, on their oath aforesaid say, that" (*&c. so proceed to state the finding of the jury on all the issues*).] [*Conclude with stating an assessment of the damages, thus:*] And they assess the damages of the plaintiff on occasion of the premises within complained of by him, over and above his costs of suit, to £ , and for those costs to 40*s*. Therefore, &c.

5.—FORM OF A JUDGMENT FOR PLAINTIFF on a Verdict in a Town Cause.

[*Copy the Nisi Prius record and then proceed thus:*] Afterwards, on the day of in the year of our Lord [*day of signing final judgment*] come the parties aforesaid, by their respective attorneys aforesaid [*or as the case may be, if they have not appeared by attorneys*], and the Right Honourable John Lord Campbell, Her Majesty's Chief Justice assigned to hold pleas in the Court of our Lady the Queen before the Queen herself [*or if in the Common Pleas* "the Right Honourable Sir John Jervis, Knight, Her Majesty's Chief Justice assigned to hold pleas

in Her Majesty's Court of the Bench, *or if in the Exchequer* "the Right Honourable Sir Frederick Pollock, Knight, Chief Baron of Her Majesty's Court of Exchequer," *or* "the Honourable Sir , Knight, before whom the said issue was (*or* "issues were") tried in the absence of Her Majesty's Chief Justice," &c., *as the case may be*], hath sent hither his record had before him in these words: Afterwards [*&c. copy the postea*]. Therefore it is considered that the plaintiff do recover against the defendant the said moneys by the jurors aforesaid in form aforesaid assessed [*or if the action be in debt and the jury do not assess the debt, but only the damages and forty shillings costs, then say* "do recover against the defendant the said debt of , and the moneys by the jurors aforesaid in form aforesaid assessed"]; and also £ for his costs of suit by the court here adjudged of increase to the plaintiff, which said moneys and costs [*or* "debt, damages and costs"] in the whole amount to £ .

[*In the margin of the roll, opposite the words* "Therefore it is considered," *write* "Judgment signed the day of A.D. ," *stating the day of signing the judgment.*]

6.—THE LIKE, in a Cause tried at the Assizes.

[*Copy the Nisi Prius record, and then proceed thus:*] Afterwards, on the day of in the year of our Lord (*day of signing final judgment*), come the parties aforesaid, by their respective attorneys aforesaid (*or as the case may be*); and Sir , Knight, and Sir , Knight, justices of our Lady the Queen assigned to take the assizes in and for the said county [*or* "city and county," &c., *as the case may be*], before whom the said issue was [*or* "issues were"] tried, have sent hither their record had before them in these words. Afterwards, &c. [*Conclude as directed in the preceding form*].

7.—FORM OF AN ISSUE where it is directed to be tried by the Sheriff, &c.

[*Commence the issue as in the Form No.* 1, *above prescribed. Then copy all the pleadings, and after*

the joinder of issue proceed as follows:] And forasmuch as the sum sought to be recovered in this suit, and indorsed on the said writ of summons, does not exceed 20*l.*, hereupon on the day of in the year (*teste of writ of trial*), pursuant to the statute in that case made and provided, the sheriff [*or* "the judge of , being a court of record for the recovery of debt in the said county," *as the case may be*], is commanded that he summon twelve, &c., who neither, &c., who shall be sworn truly to try the issue [*or* "issues"] above joined between the parties aforesaid, and that he proceed to try such issue [*or* "issues"] accordingly; and, when the same shall have been tried, that he make known to the court here what shall have been done by virtue of the writ of our Lady the Queen to him in that behalf directed, with the finding of the jury thereon indorsed, on the day of , &c.

8.—FORM OF A WRIT OF TRIAL before the Sheriff, &c.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the sheriff of , [*or* "to the judge of , being a court of record for the recovery of debt in our county of ," *as the case may be,*] greeting: Whereas *A. B.*, in our Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be*] at Westminster, on the (*date of first writ of summons*) day of , in the year of our Lord impleaded *C. D.* in an action for [&c. *here recite the declaration in the past tense*], and the plaintiff claimed £ : And whereas the defendant on the (*date of plea*) day of last, by his attorney (*or, as the case may be,*) came into our said court, and said [&c. *here recite the pleas and pleadings to the joinder of issue*]: And whereas the sum sought to be recovered in the said action, and indorsed on the writ of summons therein, does not exceed 20*l.*; and it is fitting that the issue [*or* "issues"] joined as aforesaid should be tried before you the said sheriff [*or* "judge," *as the case may be*]: We, therefore, pursuant to the statute in such case made and provided, command you that you do summon twelve free and lawful men of your county

duly qualified according to law, who are in nowise akin to the plaintiff or to the defendant, who shall be sworn duly to try the said issue [*or* "issues"] joined between the parties aforesaid, and that you proceed to try such issue [*or* "issues"] accordingly; and when the same shall have been tried in manner aforesaid we command you that you make known to us [*or in the Common Pleas* "to our justices," *or in the Exchequer* "to the barons of our said Exchequer," *as the case may be*], at Westminster, what shall have been done by virtue of this writ, with the finding of the jury hereon indorsed, on the day of next. Witness [*name of the Chief Justice, or of the Chief Baron, if the action is in the Exchequer*] at Westminster, the day of in the year of our Lord .

9.—FORM OF INDORSEMENT on the Writ of Trial of the Verdict.

Afterwards, on the day of , in the year of our Lord [*day of trial*] before me, sheriff of the county of , [*or* "judge of the court of "] came as well the within-named plaintiff as the within-named defendant, by their respective attorneys within named, [*or, as the case may be,*] and the jurors of the jury by me duly summoned, as within commanded, also came, and being duly sworn to try the issue [*or* "issues"] within mentioned on their oath, said that [&c. *here state the finding of the jury as in a postea on a trial at Nisi Prius*].

The answer to *S. S.*, sheriff.

10.—THE LIKE, in case a Nonsuit takes place.

[*Proceed as in the above form, but after the words* "duly sworn to try the issue within mentioned," *proceed as follows:*] and were ready to give their verdict in that behalf; but the plaintiff being solemnly called, came not, nor did he further prosecute his said suit against the defendant.

11.—Form of Judgment for the Plaintiff after Trial before the Sheriff.

[*Copy the issue, and then proceed as follows:*] Afterwards, on the day of in the year of our Lord [*day of signing final judgment*], come the parties aforesaid, by their respective attorneys aforesaid [*as the case may be*], and the said sheriff [*or* "judge," *as the case may be*], before whom the said issue [*or* "issues"] came on to be tried, hath sent hither the said last-mentioned writ, with an indorsement thereon, which said indorsement is in these words: to wit [*copy the indorsement*]. Therefore it is considered, &c. [*conclude as in other cases. See the form supra, No. 5.*]

WRITS OF EXECUTION.

No. 1.—Writ of Fieri Facias on a Judgment for Plaintiff.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the sheriff of greeting. We command you, that [*If sued out of the Court of Exchequer, say* "We command you, that you omit not by reason of any liberty of your county, but that you enter the same, and"] of the goods and chattels of *C. D.* in your bailiwick you cause to be made £ [*the amount of all the moneys recovered by the judgment*] which *A. B.* lately in our Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be*] recovered against him, whereof the said *C. D.* is convicted, together with interest upon the said sum at the rate of four pounds per centum per annum from the day of in the year of our Lord (*a*), on which day the judgment aforesaid was entered up, and have that money, with such interest as aforesaid, before us [*or in the Common Pleas* "before our justices," *or in the Exchequer* "before the barons of our Exchequer," *as the case may be*], at Westminster immediately after the execution hereof, to be rendered to the said *A. B.*, and that you do all such things as by the statute

(*a*) The day on which the judgment was entered up, or if entered up prior to the 1st of October, 1838, say "from the 1st day of October in

the year of our Lord 1838," omitting the words "on which day the judgment aforesaid was entered up."

passed in the second year of our reign you are authorized and required to do in this behalf. And in what manner you shall have executed this our writ make appear to us [*or in the Common Pleas* "to our justices," *or in the Exchequer* "to the barons of our Exchequer," *as the case may be*], at Westminster, immediately after the execution hereof, and have you there then this writ. Witness, at Westminster the day of in the year of our Lord .

No. 2.—Writ of Fieri Facias on a Judgment for Defendant.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the sheriff of greeting. We command you, that you cause to be made [*If sued out of the Court of Exchequer*, "that you omit not by reason of any liberty of your county, but that you enter the same, and cause to be made"] of the goods and chattels in your bailiwick of *A. B.* £ , which lately in our Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be*], were awarded to *C. D.*, for the costs of defence in an action lately prosecuted in our said court by the said *A. B.* against the said *C. D.*, whereof the said *A. B.* is convicted, together with interest on the said sum at the rate of four pounds per centum per annum from the day of in the year of our Lord (*a*), on which day the judgment aforesaid was entered up, and have you that money before us [*or in the Common Pleas* "before our justices," *or in the Exchequer* "before our barons," *as the case may be*], at Westminster, immediately after the execution hereof, to be rendered to the said *C. D.*; and that you do all such things as by the statute passed in the second year of our reign you are authorized and required to do in this behalf. And in what manner you shall have executed this our writ make appear to us [*or in the Common Pleas* "to our justices," *or in the Exchequer* "to the barons of our Exchequer," *as the case may be*], at Westminster, immediately after the execution hereof, and have you there then this writ. Witness at Westminster, the day of in the year of our Lord .

(*a*) The day on which the judgment was entered up, or if entered up prior to the 1st of October, 1838, say "from the 1st day of October in the year of our Lord 1838, omitting the words "on which day the judgment aforesaid was entered up."

No. 3.—Writ of Fieri Facias on a Rule for Payment of Money.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the sheriff of greeting. We command you, that [*If sued out of the Court of Exchequer, say* "We command you, that you omit not by reason of any liberty of your county, but that you enter the same, and"] of the goods and chattels of *C. D.* in your bailiwick you cause to be made £ which lately in our Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be*], by a rule of our said court dated the day of A.D. were ordered to be paid by the said *C. D.* to *A. B.*; and that of the said goods and chattels of the said *C. D.* in your bailiwick you further cause to be made interest upon the said sum at the rate of four pounds per centum per annum from the day of in the year of our Lord (*a*), on which day the said rule was made, and have that money, together with such interest as aforesaid, before us [*or in the Common Pleas* "before our justices," *or in the Exchequer* "before the barons of our Exchequer," *as the case may be*], at Westminster, immediately after the execution hereof, to be rendered to the said *A. B.*; and that you do all such things as by the statute passed in the second year of our reign you are authorized and required to do in this behalf. And in what manner you shall have executed this our writ make appear to us [*or in the Common Pleas* "to our justices," *or in the Exchequer* "to the barons of our Exchequer," *as the case may be*], at Westminster, immediately after the execution hereof, and have you there then this writ. Witness at Westminster, the day of in the year of our Lord .

(*a*) The day on which the rule was made, or if it were made prior to the 1st of October, 1838, say "from the 1st day of October in the year of our Lord 1838," omitting the words "on which day the said rule was made."

No. 4.—Writ of Fieri Facias on a Rule for Payment of Money and Costs.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the sheriff of greeting. We command you, that [*If sued out of the Court of Exchequer, say* "We command you, that you omit not

by reason of any liberty of your county, but that you enter the same, and"] of the goods and chattels of *C. D.* in your bailiwick you cause to be made £ which lately in our Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be,*] by a rule of our said court dated the day of in the year of our Lord were ordered to be paid by the said *C. D.* to *A. B.*, together with certain costs in the said rule mentioned, which said costs have been taxed and allowed by our said court at £ ; and that of the said goods and chattels of the said *C. D.* in your bailiwick you further cause to be made interest upon the said two several sums at the rate of four pounds per centum per annum from the day of in the year of our Lord (*a*), and have those moneys, together with such interest as aforesaid, before us [*or in the Common Pleas* "before our justices," *or in the Exchequer* "before the barons of our Exchequer," *as the case may be,*] at Westminster, immediately after the execution hereof, to be rendered to the said *A. B.*; and that you do all such things as by the statute passed in the second year of our reign you are authorized and required to do in this behalf. And in what manner you shall have executed this our writ make appear to us [*or in the Common Pleas* "to our justices," *or in the Exchequer* "to the barons of our Exchequer," *as the case may be,*] at Westminster, immediately after the execution hereof, and have you there then this writ. Witness at Westminster, the day of in the year of our Lord .

(*a*) The day on which the costs were taxed. If the costs were taxed after the rule made, and you seek to recover interest on the principal money from the date of the latter, you must alter the form accordingly.

No. 5.—Writ of Fieri Facias on a Rule for Payment of Costs only.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the sheriff of greeting. We command you, that [*If sued out of the Exchequer, say* "We command you, that you omit not by reason of any liberty of your county, but that you enter the same, and"] of the goods and chattels of *C. D.* in your bailiwick you cause to be made £ for certain costs which by a rule of our Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas," *as*

the case may be,] dated the day of in the year of our Lord were ordered to be paid by the said *C. D.* to *A. B.*, which said costs have been taxed and allowed by our said court at the said sum, and that of the said goods and chattels of the said *C. D.* in your bailiwick you further cause to be made interest upon the said sum at the rate of four pounds per centum per annum from the day of in the year of our Lord (*a*), and have that money, together with such interest as aforesaid, before us [*or in the Common Pleas* "before our justices," *or in the Exchequer* "before the barons of our Exchequer," *as the case may be,*] at Westminster, immediately after the execution hereof, to be rendered to the said *A. B.*; and that you do all such things as by the statute passed in the second year of our reign you are authorized and required to do in this behalf. And in what manner you shall have executed this our writ make appear to us [*or in the Common Pleas* "to our justices," *or in the Exchequer* "to the barons of our Exchequer," *as the case may be,*] at Westminster, immediately after the execution hereof, and have you there then this writ. Witness at Westminster, the day of in the year of our Lord .

(*a*) The day on which the costs were taxed, or if there has been more than one allocatur, the day on which the last allocatur was made.

No. 6.—Writ of Fieri Facias on a Judgment of an Inferior Court removed into one of the Superior Courts.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the sheriff of greeting. We command you, that [*If sued out of the Court of Exchequer, say* "We command you, that you omit not, by reason of any liberty of your county, but that you enter the same, and"] of the goods and chattels of *C. D.* in your bailiwick you cause to be made £ which *A. B.* lately in [*insert the style of the court,*] by the judgment of the said court, recovered against the said *C. D.* whereof the said *C. D.* is convicted, and which judgment was afterwards, on the day of in the year of our Lord removed into our Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be,*] by virtue of an order of that our said court,

[*or* "of one of the justices of that our said court," *as the case may be,*] in pursuance of the statute in such case made and provided, and the costs attendant upon the application for the said order and upon the said removal were, on the day of in the year of our Lord , taxed and allowed by our said Court of Queen's Bench, [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be,*] at £ ; and we further command you, that of the said goods and chattels of the said *C. D.* in your bailiwick you further cause to be made the said £ (*a*), together with interest on the said two several sums at the rate of four pounds per centum per annum from the said day of in the year of our Lord (*b*); and that you have that money, with such interest as aforesaid, before us [*or in the Common Pleas* "before our justices," *or in the Exchequer* "before the barons of our Exchequer," *as the case may be,*] at Westminster, immediately after the execution hereof, to be rendered to the said *A. B.*; and that you do all such things as by the statute passed in the second year of our reign you are authorized and required to do in this behalf. And in what manner you shall have executed this our writ make appear to us [*or in the Common Pleas* "to our justices," *or in the Exchequer* "to the barons of our Exchequer," *as the case may be,*] at Westminster, immediately after the execution hereof, and have you there then this writ. Witness at Westminster, the day of in the year of our Lord .

(*a*) The costs attendant upon the removal of the judgment out of the Inferior Court into the Superior Court.

(*b*) The day on which the costs of removal were taxed.

No. 7.—Writ of Fieri Facias on a Rule or Order for Payment of Money made in an Inferior Court, and removed into one of the Superior Courts.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith. We command you that [*If sued out of the Court of Exchequer, say* "We command you, that you omit not by reason of any liberty of your county, but that you enter the same, and"] of the goods and chattels of *C. D.* in your bailiwick you cause to be made £ , which lately in [*insert the style of the court*], by a rule [*or* "order"] of the said court, entitled, [*as the case may be,*]

were by the said court ordered to be paid by the said *C. D.* to *A. B.*; and which rule [*or* "order"] was afterwards, on the day of in the year of our Lord , removed into our Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be*], by virtue of an order of that our said court, [*or* "of , one of the justices of that our said court," *as the case may be,*] in pursuance of the statute in that case made and provided, and the costs and charges attendant upon the application for the said last-mentioned order and upon the said removal were, on the day of in the year of our Lord , taxed and allowed by our said Court of Queen's Bench [*or* "Common Pleas" *or* "Exchequer of Pleas," *as the case may be,*] at £ ; and we further command you, that of the said goods and chattels of the said *C. D.* in your bailiwick you further cause to be made the said £ (*a*), together with interest on the said two several sums at the rate of four pounds per centum per annum from the said day of (*b*), and that you have those moneys, with such interest as aforesaid, before us [*or in the Common Pleas* "before our justices," *or in the Exchequer* "before the barons of our Exchequer," *as the case may be,*] at Westminster, immediately after the execution hereof, to be rendered to the said *A. B.*; and that you do all such things as by the statute passed in the second year of our reign you are authorized and required to do in this behalf. And in what manner you shall have executed this our writ make appear to us [*or in the Common Pleas* "to our justices," *or in the Exchequer* "to the barons of our Exchequer," *as the case may be,*] at Westminster, immediately after the execution hereof, and have you there then this writ. Witness at Westminster, the day of in the year of our Lord .

(*a*) The costs of removing the rule of the Inferior Court into the Superior Court.

(*b*) The day on which the costs of removing the rule of the Inferior Court into the Superior Court were taxed.

No. 8.—WRIT OF FIERI FACIAS on a Rule or Order for Payment of Money and Costs made in an Inferior Court, and removed into one of the Superior Courts.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the sheriff of greeting. We com-

mand you, that [*or, If sued out of the Court of Exchequer, say* "We command you, that you omit not by reason of any liberty of your county, but that you enter the same, and"] of the goods and chattels of *C. D.* in your bailiwick you cause to be made £ which lately in [*insert the style of the court*], by a rule [*or* "order"] of the said court, entitled, [*as the case may be,*] were by the said court ordered to be paid by the said *C. D.* to *A. B.*, and also £ for the costs of the said rule [*or* "order"] by the said court also ordered to be paid by the said *C. D.* to the said *A. B.*; which said rule [*or* "order"] was afterwards, on the day of in the year of our Lord , removed into our Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be,*] by an order of that our said court [*or* "of one of the justices of that our court," *as the case may be,*] in pursuance of the statute in such case made and provided; and the costs and charges attendant upon the application for the said last-mentioned order and upon the said removal were, on the day of in the year of our Lord , taxed and allowed by our said Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be,*] at £ ; and we further command you, that of the said goods and chattels of the said *C. D.* in your bailiwick you further cause to be made the said £ (*a*), together with the interest on the said three several sums at the rate of four pounds per centum per annum from the said day of in the year of our Lord (*b*), and that you have those moneys, with such interest as aforesaid, before us [*or in the Common Pleas* "before our justices," *or in the Exchequer* "before the barons of our Exchequer," *as the case may be,*] at Westminster, immediately after the execution hereof, to be rendered to the said *A. B.*; and that you do all such things as by the statute passed in the second year of our reign you are authorized and required to do in this behalf. And in what manner you shall have executed this our writ make appear to us [*or in the Common Pleas* "to our justices," *or in the Exchequer* "to the barons of our Exchequer," *as the case may be,*] at Westminster, immediately after the execution hereof, and have you there then this writ. Witness at Westminster, the day of in the year of our Lord .

(*a*) The costs of removing the rule from the Inferior Court into the Superior Court.

(*b*) The day on which the costs of removing the rule from the Inferior Court into the Superior Court were taxed.

No. 9.—Writ of Elegit on a Judgment for Plaintiff.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the sheriff of greeting. Whereas *A. B.*, lately in our Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be,*] by the judgment of the same court recovered against *C. D.* £ [*the amount of all the moneys recovered by the judgment*], whereof the said *C. D.* is convicted, and afterwards the said *A. B.* came into our said court, and according to the form of the statutes in such case made and provided, chose to be delivered to him all the goods and chattels of the said *C. D.* in your bailiwick, except his oxen and beasts of the plough, and also such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said *C. D.* or any person in trust for him was seised or possessed of on the day of in the year of our Lord (*a*), on which day the judgment aforesaid was entered up, or at any time afterwards, or over which the said *C. D.* on that day, or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, according to the form of the said statutes, until the said sum, together with interest thereon at the rate of four pounds per centum per annum from the day of in the year of our Lord (*b*), shall have been levied. Therefore we command you, that, [*If sued out of the Court of Exchequer, say* "Therefore we command you, that you omit not, by reason of any liberty of your county, but that you enter the same and"] without delay, you cause to be delivered to the said *A. B.* by a reasonable price and extent all the goods and chattels of the said *C. D.* in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said *C. D.* or any person in trust for him was seised or possessed of on the said

(*a*) The day on which the judgment was entered up.

(*b*) The day on which the judgment was entered up, or in case the judgment was entered up prior to the 1st of October, 1838, say "from the 1st day of October in the year of our Lord 1838."

(a) The day on which the judgment was entered up.

day of (*a*), or at any time afterwards, or over which the said *C. D.* on that day, or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said *A. B.* as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said £ , together with interest as aforesaid shall have been levied. And in what manner you shall have executed this our writ make appear to us [*or in the Common Pleas* "to our justices," *or in the Exchequer* "to the barons of our Exchequer," *as the case may be,*] at Westminster, immediately after the execution hereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement, and have you there then this writ. Witness at Westminster, the day of in the year of our Lord .

No. 10.—Writ of Elegit on Rule for Payment of Money.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the sheriff of greeting. Whereas lately in our Court of Queen's Bench, [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be,*] by a rule of the said court, dated the day of in the year of our Lord the sum of £ was ordered to be paid by *C. D. to A. B.* and afterwards the said *A. B.* came into our said court and, according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said *C. D.* in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said *C. D.*, or any person in trust for him, was seised or possessed of on the day of in the year of our Lord (*b*), on which day the said rule was made, or at any time afterwards, or over which the said *C. D.* on that day, or at any time after-

(b) The day on which the rule was made.

wards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said sum, together with interest upon the same at the rate of four pounds per centum per annum from the said day of in the year of our Lord (*a*), shall have been levied: Therefore we command you, that [*If sued out of the Court of Exchequer, say* "Therefore we command you, that you omit not by reason of any liberty of your county, but that you enter the same, and"] without delay you cause to be delivered to the said *A. B.*, by a reasonable price and extent, all the goods and chattels of the said *C. D.* in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said *C. D.*, or any person in trust for him, was seised or possessed of on the said day of (*a*), or at any time afterwards, or over which the said *C. D.* on that day, or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said *A. B.* as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said £ , together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ make appear to us [*or in the Common Pleas* "to our justices," *or in the Exchequer* "to the barons of our Exchequer," *as the case may be*], at Westminster, immediately after the execution hereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement, and have you there then this writ. Witness at Westminster, the day of in the year of our Lord .

(*a*) The day on which the rule was made.

No. 11.—Writ of Elegit on a Rule for Payment of Money and Costs.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the sheriff of greeting. Whereas lately in our Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be*], by a rule of the said court, dated the day of in the year of our Lord the sum of £ was ordered to be paid by *C. D.* to *A. B.*, together with certain costs in the said rule mentioned, which said costs were afterwards, on the day of in the year of our Lord taxed and allowed by our said court at £ ; and afterwards the said *A. B.* came into our said court, and, according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said *C. D.* in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said *C. D.*, or any one in trust for him, was seised or possessed of on the day of in the year of our Lord (*a*), or at any time afterwards, or over which the said *C. D.* on that day, or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums, together with interest upon the same at the rate of four pounds per centum per annum from the said day of in the year of our Lord (*a*), shall have been levied: Therefore we command you, that [*If sued out of the Court of Exchequer, say* "Therefore we command you, that you omit not by reason of any liberty of your county, but that you enter the same, and"] without delay you cause to be delivered to the said *A. B.*, by a reasonable price and extent, all the goods and chattels of the said *C. D.* in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or

(*a*) The day on which the costs of the rule were taxed.

customary tenure, in your bailiwick, as the said *C. D.*, or any person in trust for him, was seised or possessed of on the said day of (*a*), or at any time afterwards, or over which the said *C. D.* on that day, or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said *A. B.* as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £ and £ , together with interest as aforesaid shall have been levied. And in what manner you shall have executed this our writ make appear to us [*or in the Common Pleas* "to our justices," *or in the Exchequer* "to the barons of our Exchequer," *as the case may be*], at Westminster, immediately after the execution hereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement, and have you there then this writ. Witness at Westminster, the day of in the year of our Lord .

(*a*) The day on which the costs of the rule were taxed.

No. 12.—WRIT OF ELEGIT on a Judgment of an Inferior Court, removed into one of the Superior Courts.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the sheriff of greeting. Whereas *A. B.*, lately in [*insert the style of the court*], by the judgment of the said court recovered against *C. D.* £ whereof the said *C. D.* is convicted; and whereas the said judgment was afterwards, on the day of in the year of our Lord , removed into our Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be*], by virtue of an order of that our said court [*or* "of , one of the justices of that our said court," *as the case may be*], in pursuance of the statute in that case made and provided, and the costs and charges attendant upon the application for the said order and upon the said removal were afterwards, on the day of in the year of our Lord , taxed and allowed by our said Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas," *as*

the case may be,] at £ ; and afterwards the said *A. B.* came into that our said court [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be*], and, according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said *C. D.* in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said *C. D.*, or any person in trust for him, was seised or possessed of on the said day of , in the year of our Lord aforesaid (*a*), or at any time afterwards, or over which the said *C. D.* on that day, or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums, together with interest upon the same at the rate of four pounds per centum per annum from the said day of in the year of our Lord (*a*), shall have been levied: Therefore we command you, that [*If sued out of the Court of Exchequer, say* "Therefore we command you, that you omit not by reason of any liberty of your county, but that you enter the same, and"] without delay you cause to be delivered to the said *A. B.* by a reasonable price and extent all the goods and chattels of the said *C. D.* in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said *C. D.*, or any one in trust for him, was seised or possessed of on the said day of (*a*), or at any time afterwards, or over which the said *C. D.* on that day, or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said *A. B.* as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £ and £ , together

(*a*) The day on which the costs of removing the judgment were taxed.

with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ make appear to us [*or in the Common Pleas* "to our justices," *or in the Exchequer* "to the barons of our Exchequer," *as the case may be*], at Westminster, immediately after the execution hereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement, and have you there then this writ. Witness at Westminster, the day of in the year of our Lord .

No. 13.—WRIT OF ELEGIT on a Rule or Order for Payment of Money made in an Inferior Court, and removed into one of the Superior Courts.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the sheriff of greeting. Whereas lately in [*insert the style of the court*], by a rule [*or* "order"] of the said court, entitled [*as the case may be*], the sum of £ was by the said court ordered to be paid by *C. D.* to *A. B.*; and whereas the said rule [*or* "order"] was afterwards, on the day of in the year of our Lord , removed into our said Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be*], by virtue of an order of that our said court [*or* "of one of the justices of that our said court," *as the case may be*], in pursuance of the statute in that case made and provided, and the costs and charges attendant upon the application for the said last-mentioned order and upon the said removal were afterwards, on the day of in the year of our Lord , taxed and allowed by our said Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be*], at £ ; and afterwards the said *A. B.* came into that our said court, and, according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said *C. D.* in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said *C. D.*, or any person in trust for him, was seised or possessed of on the said

(a) The day on which the costs of removing the rule of the Inferior Court into the Superior Court were taxed.

day of in the year of our Lord (a), or at any time afterwards, or over which the said *C. D.* on the said day of (a), or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums, together with interest on the same at the rate of four pounds per centum per annum from the said day of (a) shall have been levied: Therefore we command you, that [*If sued out of the Court of Exchequer, say* "Therefore we command you, that you omit not by reason of any liberty of your county, but that you enter the same, and"] without delay you cause to be delivered to the said *A. B.*, by a reasonable price and extent, all the goods and chattels of the said *C. D.* in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said *C. D.*, or any one in trust for him, was seised or possessed of on the said day of (a), or at any time afterwards, or over which the said *C. D.* on that day, or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said *A. B.* as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said several sums of £ and £ , together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ make appear to us [*or in the Common Pleas* "to our justices," *or in the Exchequer* "to the barons of our Exchequer," *as the case may be*], at Westminster, immediately after the execution hereof, under your seals and the seals of those by whose oath you shall make the said extent and appraisement, and have you there then this writ. Witness at Westminster, the day of in the year of our Lord .

No. 14.—WRIT OF ELEGIT on a Rule or Order for Payment of Money and Costs made in an Inferior Court, and removed into one of the Superior Courts.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the sheriff of greeting. Whereas lately in [*insert the style of the court*], by a rule [*or* "order"] of the said court, entitled [*as the case may be*], the sum of £ was by the said court ordered to be paid by *C. D.* to *A. B.*, together with the costs of the said rule [*or* "order"], which said costs were afterwards, on the day of , in the year of our Lord , taxed and allowed by the said court at £ ; and whereas the said rule [*or* "order"] was afterwards, on the day of , in the year of our Lord , removed into our Court of Queen's Bench, [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be,*] by virtue of an order of that our said court [*or* "of one of the justices of that our said court," *as the case may be*], in pursuance of the statute in that case made and provided, and the costs and charges attendant upon the application for the said last-mentioned order and upon the said removal were afterwards, on the day of in the year of our Lord , taxed and allowed by our said Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be*], at £ ; and afterwards the said *A. B.* came into our said Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be*], and, according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said *C. D.* in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said *C. D.*, or any person in trust for him, was seised or possessed of on the said day of (*a*), or at any time afterwards, or over which the said *C. D.* on that day, or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents and hereditaments respectively, according to the nature

(*a*) The day on which the costs of removing the rule of the Inferior Court into the Superior Court were taxed.

and tenure thereof, to him and to his assigns, until the said three several sums, together with interest upon the same at the rate of four pounds per centum per annum from the said day of (*a*), shall have been levied: Therefore we command you, that [*If sued out of the Court of Exchequer, say* "Therefore we command you, that you omit not by reason of any liberty of your county, but that you enter the same and"] without delay you cause to be delivered to the said *A. B.*, by a reasonable price and extent, all the goods and chattels of the said *C. D.* in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said *C. D.*, or any person in trust for him, was seised or possessed of on the said day of (*a*), or at any time afterwards, or over which the said *C. D.* on that day, or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said *A. B.* as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said three several sums of £ , and £ , and £ , together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ make appear to us [*or in the Common Pleas* "to our justices," *or in the Exchequer* "to the barons of our Exchequer," *as the case may be*], at Westminster, immediately after the execution hereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement, and have you there then this writ. Witness at Westminster, the day of in the year of our Lord .

(*a*) The day on which the costs of removing the rule of the Inferior Court into the Superior Court were taxed.

No. 15.—Writ of Capias ad Satisfaciendum on a Judgment for Plaintiff.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the sheriff of greeting. We command you, that you [*If sued out of the Court of Exchequer, say* "We command you, that you omit not

by reason of any liberty of your county, but that you enter the same, and"] take *C. D.*, if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us [*or in the Common Pleas* "before our justices," *or in the Exchequer* "before the barons of our Exchequer," *as the case may be*], at Westminster, immediately after the execution hereof, to satisfy *A. B.* £ [*the amount of all the moneys recovered by the judgment*], which the said *A. B.* lately in our Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be*] recovered against the said *C. D.*, whereof the said *C. D.* is convicted, together with interest upon the said sum, at the rate of four pounds per centum per annum from the day of in the year of our Lord (*a*), on which day the judgment aforesaid was entered up, and have you there then this writ. Witness at Westminster, the day of in the year of our Lord .

(*a*) The day on which judgment was entered up, or if entered up prior to the 1st of October, 1838, say "from the 1st day of October in the year of our Lord 1838, omitting the words "on which day the judgment aforesaid was entered up."

No. 16.—Writ of Capias ad Satisfaciendum on a Judgment for Defendant.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the sheriff of greeting. We command you, that you take [*or, If sued out of the Court of Exchequer, say* "that you omit not by reason of any liberty of your county, but that you enter the same and take"] *A. B.*, if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us [*or in the Common Pleas* "before our justices," *or in the Exchequer* "before the barons of our Exchequer," *as the case may be*], at Westminster, immediately after the execution hereof, to satisfy *C. D.* £ , which lately in our Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be*] were awarded to the said *C. D.* for his costs of defence in an action lately prosecuted in our said court by the said *A. B.* against the said *C. D.*, whereof the said *A. B.* is convicted, together with interest upon the said sum at the rate of four pounds per centum per annum from the day of in the year of our Lord (*b*), on which day the judgment aforesaid was entered up, and have you there then this writ. Witness at West-

(*b*) The day on which the judgment was entered

minster, the day of in the year of our Lord .

up, or if entered up prior to the 1st of October, 1838, say "from the 1st day of October in the year of our Lord 1838," omitting the words "on which day the judgment aforesaid was entered up."

No. 17.—WRIT OF CAPIAS AD SATISFACIENDUM on a Rule for Payment of Money.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the sheriff of greeting. We command you, that you take [*If sued out of the Court of Exchequer, say* "We command you, that you omit not by reason of any liberty of your county, but that you enter the same, and take"] *C. D.*, if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us [*or in the Common Pleas* "before our justices," *or in the Exchequer* "before the barons of our Exchequer," *as the case may be*], at Westminster, immediately after the execution hereof, to satisfy *A. B.* £ , which lately in our Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be*], by a rule of our said court dated the day of in the year of our Lord were ordered to be paid by the said *C. D.* to the said *A. B.*; and further to satisfy the said *A. B.* interest upon the said sum at the rate of four pounds per centum per annum from the day and year aforesaid (*a*), and have you there then this writ. Witness at Westminster, the day of in the year of our Lord .

(*a*) The day on which the rule was made, or if it were made prior to the 1st of October, 1838, say "from the 1st day of October in the year of our Lord 1838."

No. 18.—WRIT OF CAPIAS AD SATISFACIENDUM on a Rule for Payment of Money and Costs.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the sheriff of greeting. We command you, that you take [*If sued out of the Court of Exchequer, say* "We command you, that you omit not by reason of any liberty of your county, but that you enter the same, and take"] *C. D.*, if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us [*or in the Common Pleas* "before our justices," *or in the Exchequer* "before the barons of our Exchequer," *as the case may be*], at Westminster, immediately after the execution hereof, to satisfy *A. B.* £ , which lately in our Court of Queen's Bench [*or* "Common

Pleas," *or* "Exchequer of Pleas," *as the case may be*], by a rule of our said court dated the day of in the year of our Lord , were ordered to be paid by the said *C. D.* to the said *A. B.*, together with certain costs in the said rule mentioned, which said costs have been taxed and allowed by our said court at £ [*the amount of the allocatur or allocaturs, if more than one*], and further to satisfy the said *C. D.* the said last-mentioned sum, together with interest upon the said two several sums, at the rate of four pounds per centum per annum from the day of in the year of our Lord (*a*), on which day the said costs were taxed, and have you there then this writ. Witness at Westminster, the day of in the year of our Lord.

(*a*) The day on which the costs of the rule were taxed. If interest be claimed on the principal money from the date of the rule, alter the form accordingly.

No. 19.—WRIT OF CAPIAS AD SATISFACIENDUM on a Rule for Payment of Costs only.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the sheriff of greeting. We command you, that you take [*If sued out of the Court of Exchequer, say* "We command you, that you omit not by reason of any liberty of your county, but that you enter the same, and take"] *C. D.*, if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us [*or in the Common Pleas* "before our justices," *or in the Exchequer* "before the barons of our Exchequer," *as the case may be*], at Westminster, immediately after the execution hereof, to satisfy *A. B.* £ for certain costs which by a rule of our Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be*], dated the day of in the year of our Lord were ordered to be paid by the said *C. D.* to the said *A. B.*, which said costs have been taxed and allowed by our said court at the said sum, and further to satisfy the said *C. D.* interest upon the said sum at the rate of four pounds per centum per annum from the day of in the year of our Lord (*b*), and have you there then this writ. Witness at Westminster, the day of in the year of our Lord .

(*b*) The day on which the costs of the rule were taxed, or if there have been several allocaturs, the day on which the last allocatur was made.

No. 20.—Writ of Capias ad Satisfaciendum on a Judgment in an Inferior Court, removed into one of the Superior Courts.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the sheriff of greeting. We command you, that you take [*If sued out of the Court of Exchequer, say* "We command you, that you omit not by reason of any liberty of your county, but that you enter the same, and take"] *C. D.*, if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us [*or in the Common Pleas* "before our justices," *or in the Exchequer* "before the barons of our Exchequer," *as the case may be*], at Westminster, immediately after the execution hereof, to satisfy *A. B.* £ , which the said *A. B.* lately in [*insert the style of the court*], by the judgment of the said court recovered against the said *C. D.*, whereof the said *C. D.* is convicted; and which judgment was afterwards, on the day of in the year of our Lord removed into our Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be*], by virtue of an order of that our said court [*or* "of one of the justices of that our said court," *as the case may be*], in pursuance of the statute in such case made and provided, and the costs and charges attendant upon the application for the said order and upon the said removal were on the day of in the year of our Lord taxed and allowed by our said Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be*], at £ , and further to satisfy the said *A. B.* the said £ (*a*), together with interest upon the said two several sums at the rate of four pounds per centum per annum from the said day of in the year of our Lord (*b*), and have you there then this writ. Witness at Westminster, the day of in the year of our Lord .

(*a*) The costs attendant upon the removal of the judgment out of the Inferior Court into the Superior Court.

(*b*) The day on which the costs of removal were taxed.

No. 21.—Writ of Capias ad Satisfaciendum on a Rule or Order of an Inferior Court for Payment of Money, removed into one of the Superior Courts.

Victoria, by the grace of God of the United King-

dom of Great Britain and Ireland Queen, Defender of the Faith; to the sheriff of greeting. We command you, that you take [*If sued out of the Court of Exchequer, say* "We command you, that you omit not by reason of any liberty of your county, but that you enter the same and take"] *C. D.*, if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us [*or in the Common Pleas* "before our justices," *or in the Exchequer* "before the barons of our Exchequer," *as the case may be*], at Westminster, immediately after the execution hereof, to satisfy *A. B.* £ , which lately in [*insert the style of the court*], by a rule [*or* "order"] of the said court, entitled [*as the case may be*], were ordered to be paid by the said *C. D.* to the said *A. B.*, and which rule [*or* "order"] was afterwards, on the day of in the year of our Lord , removed into our Court of Queen's Bench, [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be*], by an order of that our said court [*or* "of , one of the justices of that our said court," *as the case may be*], in pursuance of the statute in such case made and provided, and the costs and charges attendant upon the application for the said last-mentioned order and upon the said removal were, on the day of in the year of our Lord , taxed and allowed by our said Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be*], at £ , and also to satisfy the said *A. B.* the said £ (*a*), together with interest on the said two several sums at the rate of four pounds per centum per annum from the said day of in the year of our Lord (*b*), and have you there then this writ. Witness at Westminster, the day of in the year of our Lord .

(*a*) The costs of removing the rule of the Inferior Court into the Superior Court.

(*b*) The day on which the costs of removal were taxed.

No. 22.—Writ of Capias ad Satisfaciendum, on a Rule or Order of an Inferior Court for Payment of Money and Costs removed into one of the Superior Courts.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the sheriff of greeting. We command you, that you take [*If sued out of the Court of Exchequer, say* "We command you, that you omit not

by reason of any liberty of your county, but that you enter the same, and take"] *C. D.*, if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us [*or in the Common Pleas* "before our justices," *or in the Exchequer* "before the barons of our Exchequer," *as the case may be*], at Westminster, immediately after the execution hereof, to satisfy *A. B.* £ , which lately in [*insert the style of the court*], by a rule [*or* "order"] of the said court, entitled, *&c.* [*as the case may be*], were by the said court ordered to be paid by the said *C. D.* to the said *A. B.*, and also £ for the costs of the said rule by the said court also ordered to be paid by the said *C. D.* to the said *A. B.*; which said rule [*or* "order"] was afterwards, on the day of in the year of our Lord , removed into our Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be*], by an order of that our said court [*or* "of one of the justices of that our said court," *as the case may be*], in pursuance of the statute in that case made and provided; and the costs and charges attendant upon the application for the said last-mentioned order and upon the said removal were, on the day of in the year of our Lord , taxed and allowed by our said Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be*] at £ , and also to satisfy the said *A. B.* the said £ (*a*), together with interest on the said three several sums at the rate of four pounds per centum per annum from the day of in the year of our Lord (*b*), and have you there then this writ. Witness at Westminster, the day of in the year of our Lord .

(*a*) The costs of removing the rule from the Inferior Court into the Superior Court.

(*b*) The day on which the costs of removing the rule from the Inferior Court were taxed.

No. 23.—WRIT OF HABERE FACIAS IN EJECTMENT upon a Judgment by Default.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender the Faith; to the sheriff of greeting. Whereas *A. B.* lately in our Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be*], by the judgment of the same court, recovered possession of [*here describe the property as in the writ of ejectment, or if part only of the land has been recovered, describe such part as in the*

judgment], with the appurtenances, in your bailiwick: Therefore we command you, that [*If sued out of the Court of Exchequer, say* "Therefore we command you, that you omit not by reason of any liberty of your county, but that you enter the same, and"] without delay you cause the said *A. B.* to have possession of the said lands and premises with the appurtenances. And in what manner you have executed this our writ make appear to us [*or in the Common Pleas* "to our justices," *or in the Exchequer* "to the barons of our Exchequer," *as the case may be*], at Westminster, immediately upon the execution hereof, and have you there then this writ. Witness at Westminster, the day of in the year of our Lord .

No. 24.—WRIT OF HABERE FACIAS and FIERI FACIAS for Costs upon a Judgment for Plaintiff in Ejectment where Defendant has appeared.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the sheriff of greeting. Whereas *A. B.* lately in our Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be*] recovered possession of [*here describe the property as in the writ of ejectment, or if part only of the land has been recovered, describe such part as in the judgment*], with the appurtenances, in your bailiwick, in an action of ejectment at the suit of the said *A. B.* against *C. D.*: Therefore we command you, that without delay you cause the said *A. B.* to have possession of the said lands and premises, with the appurtenances; and we also command you, that [*If sued out of the Court of Exchequer, say* "and we also command you, that you omit not by reason of any liberty of your county, but that you enter the same, and that"] of the goods and chattels of the said *C. D.* in your bailiwick you cause to be made £ which the said *A. B.* lately in our said court recovered against the said *C. D.* for the said *A. B.*'s costs of the said suit, whereof the said *C. D.* is convicted, together with interest upon the said sum at the rate of four pounds per centum per annum from the day of in the year of our Lord , on which day the judgment aforesaid was entered up, and have that money and interest aforesaid in our

said court immediately after the execution hereof, to be rendered to the said *A. B.*; and that you do all things as by the statute passed in the second year of our reign you are authorized and required to do in that behalf. And in what manner you shall have executed this our writ make appear to us [*or in the Common Pleas* "before our justices," *or in the Exchequer* "before the barons of our Exchequer," *as the case may be*], at Westminster, immediately after the execution hereof, and have you there then this writ. Witness at Westminster, the day of in the year of our Lord .

No. 25.—Writ of Fieri Facias for Costs on a Judgment for Plaintiff in Ejectment where Defendant has appeared.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the sheriff of greeting. We command you, that [*If sued out of the Court of Exchequer*, "We command you, that you omit not by reason of any liberty of your county, but that you enter the same, and"] of the goods and chattels of *C. D.* in your bailiwick you cause to be made £ which *A. B.* lately in our Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be*] recovered against him, for the said *A. B.*'s costs of suit in an action of ejectment brought by the said *A. B.* against the said *C. D.* in that court, whereof the said *C. D.* is convicted, together with interest upon the said sum at the rate of four pounds per centum per annum from the day of in the year of our Lord , on which day the judgment aforesaid was entered up, and have that money, with such interest as aforesaid, before us [*or in the Common Pleas* "before our justices," *or in the Exchequer* "before the barons of our Exchequer," *as the case may be*], at Westminster, immediately after the execution hereof, to be rendered to the said *A. B.*; and that you do all things as by the statute passed in the second year of our reign you are authorized and required to do in that behalf. And in what manner you shall have executed this our writ make appear to us [*or in the Common Pleas* "to our

justices," *or in the Exchequer* "to the barons of our Exchequer," *as the case may be*], at Westminster, immediately after the execution hereof, and have you there then this writ. Witness at Westminster, the day of in the year of our Lord .

Signed by the JUDGES.

January 11, 1853.

REGULÆ GENERALES AS TO PLEADING

MADE BY

THE JUDGES,

IN PURSUANCE OF THE COMMON LAW PROCEDURE ACT.*

TRINITY TERM, 1853.†

WHEREAS, pursuant to the provisions of the statute passed in the Session of Parliament held in the third and fourth years of the reign of his late majesty king William the Fourth, intituled "An Act for the further Amendment of the Law and the better Advancement of Justice," the judges of the Superior Courts of Common Law at Westminster made certain rules, orders, and regulations as to the mode of pleading and other matters in the said act mentioned, which said rules, orders, and regulations were duly laid before both houses of parliament, as required by that statute, and came into effect and operation respectively on the first day of Easter term, in the year of our Lord one thousand eight hundred and thirty-four, and the first day of Michaelmas Term, in the year of our Lord one thousand eight hundred and thirty-eight:

And whereas it is provided by the "Common Law Procedure Act, 1852," that it should be lawful for the judges of the Court of Common Law at Westminster, or any eight or more of them, of whom the chiefs of each of the said courts should be three, from time to time to make all such general rules and orders for the effectual execution of that act, and of the intention and object thereof, and for fixing the costs to be allowed for and in respect of the matters therein con-

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* See R. G. H. T. 1853 (*ante*, p. 347, n.), as to the authority of these rules.

† These rules (which, although dated as of *Hilary* Term, are more generally referred to as of *Trinity* Term, 1853, when they took effect) relate almost exclusively to *pleading*, as distinguished from practice, and are so far beyond the scope of this work.

See generally C. L. P. A. 1852, ss. 49—91, and notes, *ante*; and Bullen and Leake's Precedents of Pleadings.

tained, and the performance thereof, and for apportioning the costs of issues, and for other purposes mentioned in the said act, as in their judgment should be necessary or proper; and to exercise all the powers and authority given to them by an Act of Parliament passed in the session of parliament held in the thirteenth and fourteenth years of the reign of her present Majesty, intituled "An Act to enable the Judges of the Courts of Common Law at Westminster to alter the Forms of Pleading," with respect to any matter therein contained relative to practice or pleading; and the provisions of the said last-mentioned act, as to the rules, orders, or regulations made in pursuance thereof, should be held applicable to any rules, orders, or regulations which should be made in pursuance of the said Common Law Procedure Act, one thousand eight hundred and fifty-two:

And whereas by the said act passed in the session of parliament held in the thirteenth and fourteenth years of the reign of her present Majesty powers were given to the judges of the courts of common law at Westminster, by rules and orders to make alterations in the forms of pleading in the said courts, and respecting other matters in that act mentioned; and it was enacted, that all such rules, orders, or regulations should be laid before both houses of parliament in manner directed by the said act; and that no such rule, order, or regulation should have effect until three months after the same should have been so laid before both houses of parliament; and that any rule, order, or regulation so made should from and after such time aforesaid be binding and obligatory on the said courts, and all other courts of common law, and on all courts of error, and be of like force and effect as if the provisions contained therein had been expressly enacted by parliament:

And whereas it is expedient for the effectual execution of the said "Common Law Procedure Act, 1852," that the said rules, orders, and regulations respectively made in pursuance of the said statute passed in the session of parliament held in the third and fourth years of the reign of his late majesty king William the Fourth should be repealed, and that other rules, orders, and regulations should be framed in lieu thereof:

IT IS THEREFORE ORDERED, that from and after the first day of Trinity Term next inclusive, unless parliament shall in the meantime otherwise enact, the said rules, orders, and regulations made respectively

in pursuance of the said statute passed in the session of parliament held in the third and fourth years of the reign of his late majesty king William the Fourth shall be and are hereby repealed, excepting so far as the same or any of them are necessary or applicable to any pleadings, proceedings, or other matters to which they relate, had or taken previous to the said first day of Trinity Term next; and the following rules, orders, and regulations shall be in force; that is to say:—

1. Except as hereinafter provided, several counts on the same cause of action shall not be allowed, and any count or counts used in violation of this rule may, on the application of the party objecting, within a reasonable time, or before an order made for time to plead, be struck out or amended by the court or a judge, on such terms, as to costs or otherwise, as such court or judge may think fit.

As a general rule counts in detinue and trover for the same cause of action ought not to be allowed to be joined, and the former should be struck out, unless the plaintiff satisfies the judge that there is good reason for allowing both, *e. g.*, that the article is a precious article, which the plaintiff ought to be allowed to recover in specie (*Mockford* v. *Taylor*, 19 C. B. N. S. 209; L. J. 34, C. P. 352). The joinder of these two different forms of action is productive of great inconvenience in entering up judgment, and issuing execution. It would, moreover, seem that as a judgment in trover, even while unsatisfied, passes the property to the wrong-doer (*Buckland* v. *Johnson*, 15 C. B. 145; L. J. 23, C. P. 204, cited in Bullen and Leake's Precedents of Pleadings, 2nd edit., pp. 608, 624), the subsequent proceedings upon the judgment in detinue would be inconsistent with the title conferred upon the defendant by the simultaneous judgment in trover. The great advantage which a plaintiff derives from adding a count in detinue is in compelling the defendant to plead his justification, if any, specially.

2. Several pleas, replications, or subsequent pleadings, or several avowries or cognizances founded on the same ground of answer or defence, shall not be allowed; provided, that on an application to the court or a judge to strike out any count, or on an objection taken before the judge on a summons to plead several matters to the allowance of several pleas, replications, or subsequent pleadings, avowries, or cognizances on the ground of such counts or other pleadings being in violation of this rule, the court or the judge may allow such counts on the same cause of action, or such pleas, replications, or subsequent pleadings, or such

avowries or cognizances founded on the same ground of answer or defence, as may appear to such court or judge to be proper for the determining the real question in controversy between the parties on its merits, subject to such terms, as to costs and otherwise, as the court or judge may think fit.

3. When no such rule or order has been made as to costs by the court or judge, and on the trial there is more than one count, plea, replication or subsequent pleading, avowry, or cognizance on the record, founded on the same cause of action or ground of answer or defence, and the judge or presiding officer before whom the cause is tried shall at the trial certify to that effect on the record, the party so pleading shall be liable to the opposite party for all costs occasioned by such count, plea, or other pleading in respect of which he has failed to establish a distinct cause of action or distinct ground of answer or defence, including those of the evidence as well as those of the pleading.

4. The name of a county shall in all cases be stated in the margin of a declaration, and shall be taken to be the venue intended by the plaintiff, and no venue shall be stated in the body of the declaration, or in any subsequent pleading:

Provided that in cases where local description is now required, such local description shall be given.

See as to venue generally, *ante*, pp. 60—62.

As to the effect of this rule see *Richardson* v. *Lochlin* (6 B. & S. 777; L. J. 34, Q. B. 225), cited *ante*, p. 60.

5. In all actions by and against assignees of a bankrupt or insolvent, or executors or administrators, or persons authorized by act of parliament to sue or be sued as nominal parties, the character in which the plaintiff or defendant is stated on the record to sue or be sued shall not in any case be considered as in issue, unless specially denied.

6. In all actions on simple contract, except as hereinafter excepted, the plea of non assumpsit, or a plea traversing the contract or agreement alleged in the declaration, shall operate only as a denial in fact of the express contract, promise, or agreement alleged, or of the matters of fact from which the contract,

promise, or agreement alleged may be implied by law.

Exempli gratiâ. In an action on a warranty, such pleas will operate as a denial of the fact of the sale and warranty having been given, but not of the breach; and, in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest of the commencement of the risk, of the loss, or of the alleged compliance with warranties.

In actions against carriers and other bailees for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, such pleas will operate as a denial of any express or implied contract to the effect alleged in the declaration, but not of the breach.

To causes of action to which the plea of "never was indebted" is applicable, as provided in Schedule B (36) of the Common Law Procedure Act, 1852, and to those of a like nature, the plea of non assumpsit shall be inadmissible, and the plea of "never was indebted" will operate as a denial of those matters of fact from which the liability of the defendant arises; *exempli gratiâ*, in actions for goods bargained and sold, or sold and delivered, the plea will operate as a denial of the bargain and sale, or sale and delivery, in point of fact; in the like action for money had and received it will operate as a denial both of the receipt of money and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff.

In *King* v. *Walker* (2 H. & C. 384, and S. C. affirmed, as to this point in Exch. Ch. 3 H. & C. 29; L. J. 33, Ex. 325), it was held that by not traversing an averment of a total loss in a declaration on a policy of insurance on a ship, the defendant admitted no more than that there was some partial loss.

In *Welland Railway Company* v. *Blake* (6 H. & N. 410; L. J. 30, Ex. 161), "never indebted" was held a sufficient plea to an action for calls by a company incorporated by acts of a colonial legislature.

7. In all actions upon bills of exchange and promissory notes, the plea of "non assumpsit" and "never indebted" shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter

of fact; *exempli gratiâ*, the drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonour of the bill or note.

8. In every species of actions on contract, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded; *exempli gratiâ*, infancy, coverture, release, payment, performance, illegality of consideration, either by statute or common law, drawing, indorsing, accepting, &c. bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences, must be pleaded.

9. In actions on policies of assurance, the interest of the assured may be averred thus:—"That A, B, C and D, [or some or one of them,] were or was interested," &c. And it may also be averred, "that the insurance was made for the use and benefit, and on the account, of the person or persons so interested."

10. In actions on specialties and covenants, the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void as well as those which make it voidable.

See *Millership* v. *Brookes* (5 H. & N. 797; L. J. 29, Ex. 369).

11. The plea of "*nil debet*" shall not be allowed in any action.

See observations upon the application of this rule in certain penal actions, in Bullen and Leake's Precedents of Pleadings, 2nd edit., p. 308.

This rule does not prevent '*nil debet*' being pleaded as a replication; but there is no advantage in so pleading it, as the plaintiff is now at liberty to take issue generally.

12. All matters in confession and avoidance shall be pleaded specially, as above directed in actions on simple contracts.

13. In any case in which the plaintiff (in order

to avoid the expense of the plea of payment or set-off) shall have given credit in the particulars of the demand for any sum or sums of money therein admitted to have been paid to the plaintiff, or which the plaintiff admits the defendant is entitled to set off, it shall not be necessary for the defendant to plead the payment or set-off of such sum or sums of money.

But this rule is not to apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance, without giving credit for any particular sum or sums, or to cases of set-off where the plaintiff does not state the particulars of such set-off.

14. Payment shall not in any case be allowed to be given in evidence in reduction of damages, or debt, but shall be pleaded in bar.

15. In actions for detaining goods, the plea of *non detinet* shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein; and no other defence than such denial shall be admissible under that plea.

See *Morgan* v. *Marquis* (9 Exch. 145), where in an action of detinue, brought by the assignees of a bankrupt, the defendant was allowed to prove, under this issue, that he acted, in selling the goods, under the authority of the solvent partner of the bankrupt.

16. In actions for torts, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration.

Exempli gratiâ. In an action for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house.

In an action for obstructing a right of way, such

plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way.

In an action for slander of the plaintiff in his office, profession or trade, the plea of not guilty will operate in denial of speaking the words, of speaking them maliciously, and in the defamatory sense imputed, and with reference to the plaintiff's office, profession, or trade, but it will not operate as a denial of the fact of the plaintiff holding the office or being of the profession or trade alleged.

In actions for an escape, it will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings.

In actions against a carrier, the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received.

It has been held, that, upon a plea of Not Guilty to a declaration for debauching the plaintiff's wife, it was not necessary for the plaintiff to prove that the woman debauched was his wife (*Kenrick* v. *Horder*, 7 E. & B. 628).

17. All matters in confession or avoidance shall be pleaded specially, as in actions on contract.

18. In actions for trespass to land, the close or place in which, &c. must be designated in the declaration by name or abuttals or other description, in failure whereof the plaintiff may be ordered to amend, with costs, or give such particulars as the Court or a Judge may think reasonable.

19. In actions for trespass to land, the plea of not guilty shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession, or right of possession of that place, which, if intended to be denied, must be traversed specially.

20. In actions for taking, damaging, or converting the plaintiff's goods, the plea of not guilty shall operate as a denial of the defendant having committed the wrong alleged, by taking, damaging, or converting the goods mentioned, but not of the plaintiff's property therein.

21. In every case in which a defendant shall plead

the general issue, intending to give the special matter in evidence, by virtue of an Act of Parliament, he shall insert in the margin of the plea the words, "By Statute," together with the year or years of the reign in which the Act or Acts of Parliament upon which he relies for that purpose were passed, and also the chapter and section of each of such Acts, and shall specify whether such Acts are public or otherwise, otherwise such plea shall be taken not to have been pleaded by virtue of any Act of Parliament; and such memorandum shall be inserted in the margin of the issue, and of the Nisi Prius record.

See *Edwards* v. *Hodges* (15 C. B. 477; L. J. 24, C. P. 121), where an addition of the statutes relied upon was allowed, by way of amendment, after a verdict for the defendant, and after a rule had been obtained to set that verdict aside.

22. A plea containing a defence arising after the commencement of the action may be pleaded together with pleas of defences arising before the commencement of the action, provided that the plaintiff may confess such plea, and thereupon shall be entitled to the costs of the cause up to the time of the pleading of such first-mentioned plea.

See this rule explained by Parke, B., in *Kemp* v. *Balls* (10 Ex. 607; L. J. 24, Ex. 48). See also *Cook* v. *Hopewell* (11 Exch. 555). Where the defendant after pleading, by leave of a judge, withdraws his plea and pleads a matter of defence arising afterwards, and the plaintiff confesses such plea, the plaintiff is entitled, under this and the next succeeding rule, to his costs up to the time of pleading such plea, although it is neither pleaded together with pleas of defences arising before the commencement of the action, nor contains any allegation that the matter of defence arose after the last pleading; provided it appears that it must so have arisen (*Howarth* v. *Brown*, 1 H. & C. 694; L. J. 32, Ex. 99).

See p. 68, *ante*, and note to r. 23, *infra*.

Where the declaration contains counts for distinct causes of action, and the plea pleaded under this rule is an answer to some only of the counts, this provision as to costs would appear to be only partially applicable.

A plea containing a defence arising after the commencement of the action, must afford a defence to the cause of action, and also to the claim for damages up to the time of pleading the plea, it will otherwise be bad on demurrer (*Ash* v. *Pouppeville*, L. R. 3, Q. B. 86).

23. When a plea is pleaded with an allegation that the matter of defence arose after the last pleading, the plaintiff shall be at liberty to confess such plea, and shall be entitled to the costs of the cause

up to the time of pleading such plea; provided that this and the preceding rule shall not apply to the case of such plea pleaded by one or more only out of several defendants.

See generally, p. 69, *ante*, and note to r. 22, *supra*; and see *Brooks* v. *Jennings* (L. R. 1, C. P. 476, 480, *per* Willes, J.)

Where a plea that the plaintiff, since the last pleading, had been convicted of felony, is pleaded *puis darrein continuance*, the plaintiff may confess the plea and sign judgment for the costs under this rule (*Barnett* v. *L. & N. W. Railway Company*, 5 H. & N. 604; L. J. 29, Exch. 334). This rule would seem also to apply to a plea of bankruptcy or of a composition deed under the Bankruptcy Act, 1861, where such a plea is applicable (*Staffordshire Banking Company* v. *Emmott*, L. R. 2, Exch. 208, *per* Bramwell, B., at p. 217; although *contra per* Kelly, C. B., at p. 215).

A plea of arrangement in bankruptcy after action may be thus pleaded (*Morgan* v. *Harding*, 11 W. R. 65, Q. B., M. T. 1862; *Brooks* v. *Jennings*, L. R. 1, C. P. 476; *Tetley* v. *Wanless*, L. R. 2, Ex. 21; in Exch. Ch. Id. 275).

When a case falls within the proviso, the plaintiff may still, under the old practice, discontinue without payment of costs, but he cannot get his costs under this or the previous rule.

24. Courts of Error may award a repleader, or direct a trial *de novo*.

See C. L. P. A. 1852, s. 157 (*ante*, p. 134).

25. The costs of proceeding in error shall be taxed and allowed as costs in the cause, and no double costs in error shall be allowed to either party.

See pp. 138, 371, *ante*.
Fisher v. *Bridges* (4 E. & B. 666).

26. On error from one of the superior Courts, such Court shall have power to allow interest for such time as execution has been delayed by the proceedings in error, for the delaying thereof; and the Master, on taxing the costs, may compute such interest without any rule of Court or order of a Judge for that purpose.

In a case where the defendants obtained a rule to enter a verdict for them pursuant to leave reserved at the trial, the Court of Queen's Bench discharged the rule, and the Court of Exchequer Chamber, on appeal, affirmed this judgment, whereupon judgment was signed; the Court of Queen's Bench held that this rule applied to proceedings in error only, and that they had under the circumstances no power to allow interest: the Court of Exchequer Chamber, however, held that by the joint operation of this rule, stat. 3 & 4 Will. 4, c. 42, s. 30, and the C. L. P. A. 1854, the Court of Appeal had power to allow interest on the

judgment for such time as execution had been delayed by the proceedings on appeal, and made an order accordingly (*Tyne Improvement Commissioners* v. *General Steam Navigation Company*, 2 Weekly Notes, 1867, p. 159, E. T.). It would seem that it would have been irregular for the plaintiff to have signed judgment in the action, before the decision of the Court of Appeal was pronounced. (*Id.*)

Immediately after the above case was decided the R. G., T. T. 1867, as to proceedings on appeals (*post*) was promulgated, which applied similar provisions to those of this rule to proceedings on appeals.

27. In no case shall error be brought for any error in a judgment with respect to costs, but the error (if any) in that respect may be amended by the Court in which such judgment may have been given, on the application of either party.

28. A person admitted to sue *in formâ pauperis*, shall not in any case be entitled to costs from the opposite party, unless by order of the Court or a Judge.

Holmes v. *Penney* (9 Ex. 584; L. J. 23, Exch. 132).

Dooley v. *G. N. Railway Company* (4 E. & B. 341; *S. C.* 2 E. & E. 576; *S. C. sub nom. Dewley* v. *G. N. Railway Company*, L. J. 24, Q. B. 25; *S. C.* L. J. 29, Q. B. 83).

See R. G., H. T. 1853, rr. 121, 122 (*ante*, p. 381).

29. If a plaintiff in ejectment be nonsuited at the trial, the defendant shall be entitled to judgment for his costs of suit.

This is supplementary to C. L. P. A. 1852, s. 186 (*ante*, p. 151).

30. If the plaintiff in ejectment appear at the trial, and the defendant does not appear, the plaintiff shall be entitled to a verdict without producing any evidence, and shall have judgment for his costs of suit, as in other cases.

See C. L. P. A. 1853, s. 183, and note (*ante*, p. 150), and R. G., H. T. 1853, r. 114 (*ante*, p. 380).

31. No entry or continuances, by way of imparlance, *Curia advisari vult, vicecomes non misit breve*, or otherwise, shall be made upon any record or roll whatever, or in the pleadings.

32. All judgments, whether interlocutory or final, shall be entered of record of the day of the month

and year, whether in term or vacation, when signed, and shall not have relation to any other day: Provided that it shall be competent for the Court or a Judge to order a judgment to be entered *nunc pro tunc*.

Compare R. G., H. T. 1853, r. 56 (*ante*, p. 368).

CAMPBELL.
JOHN JERVIS.
FRED. POLLOCK.
E. H. ALDERSON.
J. T. COLERIDGE.
W. H. MAULE.
C. CRESSWELL.
T. J. PLATT.
EDW. VAUGHAN WILLIAMS.
T. N. TALFOURD.
SAMUEL MARTIN.
CHARLES CROMPTON.

The foregoing Rules, Orders, and Regulations were laid before both Houses of Parliament, in pursuance of the Act 13 & 14 Vict. c. 16, on the 10th day of February, 1853, and no alteration has been made therein by Parliament.

Dated this 10th day of May, 1853.

JOHN GEORGE SHAW LEFEVRE,
Dep. Cler. Parliamentor.

RULES OF MICHAELMAS VACATION, 1854.

Michaelmas Vacation, 1854.

It is ordered, That the practice to be observed in the Superior Courts of Common Law at Westminster, with respect to the matters hereinafter mentioned, shall be as follows; that is to say,

1. The provisions as to pleadings and practice contained in the Common Law Procedure Act, 1852, and the rules of practice of the Superior Courts of Common Law made the 11th January, 1853, and also the rules of pleading which came into operation on the first day of Trinity Term, 1853, so far as the same are or may be made applicable, shall extend and apply to all proceedings to be had or taken under the Common Law Procedure Act, 1854.

2. Every affidavit to be hereafter used in any cause or civil proceeding in any of the said Superior Courts of Common Law shall be drawn up in the first person, and shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and, as nearly as may be, shall be confined to a distinct portion of the subject. No costs shall be allowed for any affidavit or part of an affidavit substantially departing from this rule. This rule not to be in force until the first day of Easter Term next.*

Campbell.	C. Cresswell.
John Jervis.	W. Erle.
Fred. Pollock.	Saml. Martin.
J. Parke.	Charles Crompton.
E. H. Alderson.	R. B. Crowder.

27th November, 1854.

Forms of Proceedings.

The forms of proceedings contained in the schedule hereunder may be used in the cases to which they are

* This rule adopts in part the provisions of s. 37 of the Chancery Practice Amendment Act, 15 & 16 Vict. c. 86.

applicable, with such alterations as the nature of the action, the description of the Court in which the action is depending, the character of the parties, or the circumstances of the case may render necessary; but any variances therefrom, not being in matter of substance, shall not affect their validity or regularity.

SCHEDULE.

1.—ISSUE OF FACT to be tried by a Judge without a Jury.*

[*Proceed as in an issue to be tried by a jury as in ordinary cases, until the joinder of issue, and then thus:*] And the parties aforesaid having, by consent in writing duly signed, left the decision of the said issue [*or* "issues"] to the Court, it was on the day of , 18 [*date of rule or order for allowance of trial*], by a rule of this Court [*or* "by an order of the Honourable Sir , Knight, one of her Majesty's Justices of her Court of Queen's Bench," *or* "Common Pleas," *or* "one of the Barons of her Majesty's Court of Exchequer," *as the case may be*], ordered that such trial should be allowed: Therefore let the same be had accordingly.

2.—SUBPŒNA thereon and in other Cases.

[*The same as the form now in use, but in all cases omit the words* "by a jury."]

3.—NISI PRIUS RECORD therein.

[*The same as the form already directed by rule of Hilary Term*, 1853.]

4.—POSTEA therein, on a Verdict for Plaintiff on all the Issues, where the Cause is tried in London or Middlesex, and where the Defendant appears at the Trial.

Afterwards, on the day of , 18 (*the first day of the sittings or the day of the trial*), at

* See the Common Law Procedure Act, 1854, s. 1 (*ante*, p. 203).

the Guildhall of the City of London [*or* "at Westminster Hall, in the county of Middlesex,"] before Sir , one of her Majesty's Justices of her Court of Queen's Bench [*or* "Common Pleas," *or* "one of the Barons of her Majesty's Court of Exchequer," *as the case may be; or if tried before the Chief Justice or Chief Baron state the fact, as in the prescribed form of postea on a trial before a jury. If tried before two Judges state the names of both, and of the Court of which they are Judges*], come the parties within mentioned, by their respective attorneys within mentioned for the trial of the said issue [*or* "issues,"] and the said Judge [*or* "Baron," *or* "Chief Justice," *or* "Chief Baron," *as the case may be*] decides the said issue [*or* "each of the said issues"] in favour of the plaintiff [*or the decision may be stated in the affirmative or negative words of the issue, as, for example, thus:* "And the said Judge [*or* "Baron"] as to the first issue within joined decides that the defendant did promise as within alleged; and as to the second issue within joined, the said Judge [*or* "Baron"] decides that the defendant did not satisfy and discharge the plaintiff's claim by payment, as within alleged"], and the said Judge [*or* "Baron"] assesses the damages of the plaintiff on occasion of the premises within complained of, over and above his costs of suit, to £ . [*Omit the assessment of damages if none made*]: Therefore, &c.

5.—THE LIKE, where the Trial was at the Assizes.

Afterwards, on the day of , 18 [*the commission day of the assizes*], at , in the county [*or* "city"] of , at the assizes there holden in and for the said county [*or* "city"] before Sir , Knight, one of her Majesty's Justices of her Court of [*or* "one of the Barons of her Majesty's Court of the Exchequer," *as the case may be*], come the parties, &c. [*Conclude as in the preceding form.*]

6.—THE LIKE, where one Issue is found for the Plaintiff and another for the Defendant, the latter going to the whole Action.

[*Proceed as in the preceding forms of postea to*

the statement of the appearance of the parties at the trial, and then thus:] And the said Judge [*or* "Baron," *or* "Chief Justice," *or* "Chief Baron," *as the case may be*] decides the first issue within joined in favour of the plaintiff; and he decides the second issue within joined in favour of the defendant [*as the case may be; or the decision may be stated in the affirmative or negative of each issue, as directed in the preceding form*]: Therefore, &c.

7.—JUDGMENT thereon for Plaintiff.

[*Copy the issue, and then proceed thus:*] Afterwards on the day of 18 [*day of signing final judgment*], come the parties aforesaid, by their respective attorneys aforesaid, and Sir , Knight, one of her Majesty's Justices of her Court of [*or* "one of the Barons of her Majesty's Court of Exchequer," *as the case may be; or if tried before the Chief Justice or Chief Baron, state the fact as in the prescribed form of postea in a trial before a jury: if tried before two Judges state the names of both, and of the Court of which they are Judges*], by whom the said issue was [*or* "issues were"] tried, hath [*or* "have"] sent hither his [*or* "their"] record had before him [*or* "them"] in these words: Afterwards, &c. [*copy the postea*]: Therefore it is considered that the said plaintiff do recover against the defendant the said monies by the said Judge [*or* "Baron," *or* "Chief Justice," *or* "Chief Baron," *as the case may be*], so assessed, and £ for his costs of suit.

[*In the margin of the roll, opposite the words* "Therefore it is considered," *write* "Judgment signed the day of , A.D. 18 ," *inserting the day of signing the judgment.*]

8.—EXECUTION thereon.

[*The same as in ordinary cases.*]

9.—WRITS OF EXECUTION where the Court or a Judge decides on Matters of Account.*

[*The same as in ordinary cases of execution on a judgment, except*† *that instead of the writ stating the money to be levied as having been recovered by a judgment, and omitting the direction to levy interest, say,* £ , which by a rule of our Court of Queen's Bench [*or* "Common Pleas," *or* "by an order of Sir , Knight, one of our Justices of our Court of Queen's Bench" *or* "Common Pleas," *or* "one of the Barons of our Exchequer," *as the case may be*], dated the day of , 18 , made in pursuance of the third section of "The Common Law Procedure Act, 1854," in an action commenced in our said Court of , at the suit of *A. B.* [*or* "the said *A. B.*," *if before mentioned*], against the said *C. D.*, was ordered to be paid by the said *C. D.* to the said *A. B., as the case may be, following the terms or substance of the rule or order*]. [*If costs were ordered to be paid, then the direction to levy them may be thus:* "together with certain costs in the said rule [*or* "order"] mentioned, which said costs were afterwards on the day of , 18 , taxed and allowed by our said Court of , at £ .] [*If the rule or order directs that interest shall be paid, then the direction to levy it may be thus:* "together also with interest on the said sum of £ , at the rate of £ per cent., from the said day of , 18 ," *as the case may be, according to the rule or order.*]

10.—WRITS OF EXECUTION where Matter of Account is referred to and decided on by an Arbitrator, Officer of the Court, or County Court Judge.†

[*The same as directed in the preceding form, but instead of stating the levy to be of money ordered by a rule or order to be paid, say,* £ , which by an award [*or* "certificate"], dated the day of , 18 (*date of award or certificate*), made by

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* See the Common Law Procedure Act, 1854, s. 3 (*ante*, p. 205).

† This form is erroneous, so far as it omits the judgment, which must still be signed before execution can issue upon an award made under a compulsory reference (*Kendil* v. *Merrett*, 18 C. B. 173; L. J. 25, C. P. 252).

County court judges are now relieved of these references by 21 & 22 Vict. c. 74, s. 5.

E. F., esquire, an arbitrator appointed by the parties [*or* "by *E. F.*, esquire, one of the masters (*or other officer, naming his office*) of our Court of ," *or* "by *E. F.*, esquire, the Judge of the County Court of ," *as the case may be*], pursuant to the 3rd section of "The Common Law Procedure Act, 1854," was awarded [*or* "certified"] to be due and payable from the said *C. D.* to ["the said"] *A. B.*]

11.—SPECIAL CASE for the Opinion of the Court under Section 4 of the Common Law Procedure Act, 1854, where the allowance or disallowance of a Particular Item or Items depends on a Question of Law.*

In the Queen's Bench, ["Common Pleas," *or* "Exchequer."]

Between { *A. B.*, Plaintiff, and *C. D.*, Defendant.

The following case is stated for the opinion of the Court, under a rule of the Court [*or* "order of the Honourable Mr. Justice ," *or* "Baron ,"] dated the day of , 18 , made pursuant to the 4th section of "The Common Law Procedure Act, 1854." [*Here state the material facts of the case bearing upon the question of law to be decided.*]

The question [*or* "questions"] for the opinion of the Court is [*or* "are"] :—

First. Whether [*&c.*]

Second. Whether [*&c.*]

12.—ISSUE to be tried by a Jury where the Court or a Judge has directed it, under Section 4, where the Allowance or Disallowance of a particular Item or Items depends on a Question of Fact.

In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas."]

The day of 18 (*date of issue when delivered by the plaintiff*).

(*Venue.*) *A. B.* by his attorney sues *C. D.*, and the plaintiff [*or* "defendant"] affirms, and the

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* See *ante*, p. 207.

defendant [*or* "plaintiff"] denies, that, &c. [*Here state the question of fact to be tried as directed by the Court or Judge. In some cases it may be advisable to state an inducement before stating the question in dispute.*] [*If there be more than one question to be decided, state it thus:* "and the said 'plaintiff' [*or* 'defendant'] also affirms, and the defendant [*or* 'plaintiff'] also denies that, &c."] And it has been ordered by the Court [*or* "by the Honourable Mr. Justice " *or* "Baron "] that the said question [*or* "questions"] shall be tried by a jury; therefore let the same be tried accordingly.

13.—POSTEA thereon.

[*The same as in ordinary cases, except that there is no assessment of damages.*]

14.—SPECIAL CASE stated by an Arbitrator under Section 5 of the Common Law Procedure Act, 1854.*

[*In the special case the arbitrator must state whether the arbitration is under a compulsory reference under the Act, or whether it is upon a reference by consent of the parties where the submission has been or is to be made a rule or order of one of the Superior Courts of Law or Equity at Westminster. In the former case the award must be entitled in the Court and cause, and the rule or order of the Court must be set forth. In the latter case the terms of the reference relating to the submission being made a rule or order of Court must be set forth.*]

15.—JUDGMENT thereon when a Judgment has been ordered.

[*Copy the special case, and then proceed thus:*] Afterwards on the day of , 18 , come here the parties aforesaid, and the Court is of opinion that [*state the opinion of the Court on the question or*

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* See *ante*, p. 207.

questions stated in the case, in the affirmative or negative, as the case may be]. Therefore it is considered that the plaintiff do recover against the defendant the said £ and £ for his costs of suit.

[*In the margin, opposite the words* "Therefore it is considered," &c., *write* "Judgment signed the day of , 18 ," [*inserting the day of signing final judgment.*]

16.—POSTEA, where the Judge upon the Trial of an Issue in Fact before him under Section 1 directs an Arbitration as to Part of the Claim under Section 6 of the Common Law Procedure Act, 1854.*

[*Proceed as in the above prescribed form of postea,* No. 4 *or* 5, *as the case may be, to the statement of the appearance of the parties at the trial inclusive, and then proceed thus:*] "And as to the plaintiff's claim in the count of the declaration within mentioned [*as the case may be*], it appears to the said Judge [*or* "Baron"] that the questions arising thereon involve matter of account which cannot conveniently be tried before him; and hereupon the said Judge [*or* "Baron"] orders that the plaintiff's claim in the said count in the declaration mentioned be referred to *E. F.* of esquire, an arbitrator appointed by the said parties [*or* "to *E. F.* esquire, being one of the Masters of the Court of Queen's Bench," *or* "Common Pleas," *or* "Exchequer of Pleas," (*or other officer of the Court, stating his office*), *or* "to *E. F.* esquire, being the Judge of the County Court of ,"† upon the terms that, &c. [*set forth the terms of the order*], and the said Judge [*or* "Baron"] decides each of the said issues, except those relating to the said count of the declaration, in favour of the plaintiff [*or the statement of the decision may be in the affirmative or negative words of the issue, as, for example, thus:* "And the said Judge [*or* "Baron"] as to the first issue within joined decides that the defendant is guilty as within in the count of the declaration alleged, and as to the second issue within joined the said Judge [*or* "Baron"]

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* See *ante*, p. 208.

† See *ante*, p. 442, note.

decides that the defendant did not commit the acts within in the count of the declaration alleged by the plaintiff's leave."] And the said Judge [*or* "Baron"] assesses the damages of the plaintiff on occasion of the premises within in the count of the declaration complained of, over and above his costs of suit, to £ . [*Omit the assessment of damages if none made.*] Therefore, &c.

17.—WRIT OF HABERE FACIAS POSSESSIONEM on a Rule to deliver Possession of Land pursuant to an Award.*

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the sheriff of , greeting. We command you that you omit not by reason of any liberty of your county, but that you enter the same, and without delay you cause *A. B.* to have possession of [*here describe the lands and tenements as in the rule for the delivery of possession*], and which lands and tenements, by a rule of our Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas"], dated the day of , 18 , made pursuant to the sixteenth section of "The Common Law Procedure Act, 1854," *E. F.* [*the party named in the rule*] was ordered to deliver possession to the said *A. B.*; and in what manner you have executed this our writ make appear to us [*or in Common Pleas*, "to our Justices," *or in Exchequer*, "to the Barons of our Exchequer"] at Westminster, immediately after the execution hereof, and have you there then this writ. Witness at Westminster, the day of , in the year of our Lord .

18.—JUDGMENT for the Plaintiff on a Special Case stated under Section 32 of the Common Law Procedure Act, 1854.†

[*Copy the special case, and then proceed thus:*] Afterwards on come here the parties aforesaid

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* This writ is issued under the 16th section of the Common Law Procedure Act, 1854. See p. 215, *ante*.
† See p. 238, *ante*.

by their respective attorneys aforesaid, and the Court is of opinion that, &c. [*state the opinion of the Court on the question or questions stated in the case*]. Therefore it is considered that the plaintiff do recover against the defendant the said £ and £ for his costs of suit.

[*In the margin opposite the words*, "Therefore it is considered, &c.," *write* "Judgment signed the day of 18 ," *inserting the day of signing final judgment.*]

19.—JUDGMENT OF AFFIRMANCE by Court of Error in Exchequer Chamber on a Special Case.

[*Copy to the end of the judgment on the roll in the action, and then proceed thus :*] Afterwards on [*the day of lodging the note of error*] the defendant [*or* "plaintiff"] delivered to one of the masters of the Court here a memorandum in writing in the form required by and according to the statute in that case made and provided, alleging that there was error in law in the record and proceedings aforesaid; and afterwards on [*the day of making the entry of the suggestion on the roll*] the defendant [*or* "plaintiff"] said there was no error therein: And thereupon afterwards on [*the day of giving judgment in the Exchequer Chamber*, in the Court of Exchequer Chamber of our lady the Queen before the Justices of the Common Bench of our said lady the Queen and the Barons of her Exchequer, *or if the error be on a judgment of Common Pleas, say*, "before the Justices of our lady the Queen assigned to hold pleas in the Court of our said lady the Queen before the Queen herself and the Barons of her Exchequer," *or if the error be on a judgment of the Exchequer*, say, "before the Justices of our lady the Queen assigned to hold pleas in the Court of our lady the Queen before the Queen herself and the Justices of the Common Bench of our said lady the Queen,"] come as well the plaintiff as the defendant by their respective attorneys aforesaid,* and it appears to the said Court of Error in the Exchequer Chamber that there is no error in the record and proceedings aforesaid, or in giving the judgment aforesaid: Therefore it is considered by the said Court of Error, that the judgment aforesaid be in all things affirmed, and stand in full force and effect, the said causes above for error suggested in anywise

notwithstanding:—And it is further considered by the same Court, that the said plaintiff do recover against the defendant £ for his damages and costs which he had sustained and expended by reason of the delay of execution of the judgment aforesaid, on pretence of the prosecution of the said proceedings in error, and that the plaintiff have execution thereof.

20.—JUDGMENT OF REVERSAL in the like Case.

[*The same as the preceding form to the asterisk*, and then thus:*] And it appears to the said Court of Error that there is manifest error in the record and proceedings aforesaid, and in giving the judgment aforesaid: Therefore it is considered by the said Court of Error that the judgment aforesaid for the errors aforesaid be reversed, annulled and altogether holden for nought; and that the said defendant be restored to all things which he hath lost by occasion of the said judgment, &c.

21.—JUDGMENT OF COURT OF APPEAL in Exchequer Chamber on a Disposal of the Appeal in the Plaintiff's Favour where Judgment for him had been given in the Court below, under the 41st and 42nd Sections of the Common Law Procedure Act, 1854.†

[*Copy the case for the appeal as stated by the parties, and then proceed thus:*] Afterwards on [*the day of giving judgment of Court of Appeal*], in the Court of Exchequer Chamber of our lady the Queen, before the Justices of the Common Bench of our lady the Queen and the Barons of her Exchequer [*or if the appeal be from the Common Pleas, say,* "before the Justices of our lady the Queen assigned to hold pleas in the Court of our lady the Queen before the Queen herself and the Barons of her Exchequer," *or, if the appeal be from the Exchequer say,* "before the Justices of our lady the Queen assigned to hold pleas in the Court of our lady the Queen before the Queen herself and the Justices of the Common Bench

† See p. 243, *ante*. Now by R. G., T. T. 1867 (*post*, p. 462), a form of judgment is given, which may be used instead of the above, in order to enable the plaintiff to recover interest for such time as execution has been delayed.

of our said lady the Queen,"] come the parties aforesaid by their respective attorneys aforesaid; and the said Court of Appeal decide that, &c. [*state the decision of the Court upon the questions raised by the case on appeal*]; and it is considered by the said Court of Appeal that the plaintiff do recover against the defendant £ for his costs which the plaintiff hath sustained and expended in the said appeal, and that the plaintiff have execution thereof.

22.—Fi. Fa. against a Garnishee, under the 63rd Section of the Common Law Procedure Act, 1854, where Debt not disputed or Garnishee does not appear.*

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the sheriff of , greeting. We command you that you omit not by reason of any liberty of your county, but that you enter the same, and of the goods and chattels of *E. F.* in your bailiwick, you cause to be levied £ , being the amount of [*or* "part of the amount of," *if the debt be more than the judgment debt*] a debt due from the said *E. F.* to *C. D.*, heretofore attached in the hands of the said *E. F.* by an order of Sir knight, one of our Justices of our Court of Queen's Bench [*or* "one of our Justices of our Court of Common Pleas," *or* "one of the Barons of our Exchequer"], dated [*date of order*], pursuant to the statute in such case made, to satisfy [*or, if the debt be less than the judgment debt, say,* "towards satisfying"] £ , which *A. B.*, lately in our Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas,"] recovered against the said *C. D.*, whereof the said *C. D.* is convicted; and that you have that sum of £ before us [*or in the Common Pleas,* "before our Justices," *or in the Exchequer,* "before the Barons of our Exchequer,"] at Westminster, immediately after the execution hereof, to be rendered to the said *A. B.* in satisfaction as aforesaid, and that you do all such things as by the statute passed in the second year of our reign you are authorized and required to do in this behalf. And in

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* See p. 268, *ante*.

what manner you shall have executed this our writ make appear to us [*or in the Common Pleas*, "to our Justices," *or in the Exchequer*, "to the Barons of our Exchequer," *as the case may be*,] at Westminster, immediately after the execution hereof, and have you there then this writ. Witness , at Westminster, the day of in the year of our Lord .

23.—CA. SA. in the like Case.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the sheriff of , greeting. We command you that you omit not by reason of any liberty in your county, but that you enter the same, and take *E. F.*, if he be found in your bailiwick, and him safely keep, so that you may have his body before us [*or in Common Pleas*, "before our Justices," *or in Exchequer*, "before the Barons of our Exchequer,"] at Westminster, immediately after the execution hereof, to satisfy *A. B.* £ , being the amount [*or* "part of the amount," *if the debt be more than the judgment debt*] of a debt due from the said *E. F.* to *C. D.* heretofore attached in the hands of the said *E. F.* by an order of Sir , knight, one of our Justices of our Court of Queen's Bench [*or* "one of our Justices of our Court of Common Pleas," *or* "one of our Barons of the Exchequer,"] dated (*date of order*), pursuant to the statute in such case made and provided, to satisfy [*or* "towards satisfying," *if the debt be less than the judgment debt*] £ , which the said *A. B.* lately in our said Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be*] recovered against the said *C. D.*, whereof the said *C. D.* is convicted, and have you there then this writ. Witness , at Westminster, the day of , in the year of our Lord .

24.—WRIT against Garnishee to show Cause why the Judgment Creditor should not have execution against him for the Debt disputed by him.*

Victoria, by the grace of God of the United King-

* This writ is issued under the 64th section of the Common Law Procedure Act, 1854. See p. 268, *ante*.

dom of Great Britain and Ireland Queen, Defender of the Faith; to *E. F.* greeting. We command you that within eight days after the service of this writ upon you, inclusive of the day of such service, you appear in our Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas"] to show cause why *A. B.* should not have execution against you for £ , being the amount [*or* "part of the amount," *if the debt exceeds the judgment debt*] of a debt due from you to *C. D.* to satisfy [*or* "towards satisfying," *if the debt be less than the judgment debt*] £ , which on the day of , 18 (*date of judgment*), the said *A. B.*, by a judgment of our Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas"] recovered against the said *C. D.*, and for costs of suit in this behalf; and take notice, that in default of your so doing the said *A. B.* may proceed to execution. Witness , at Westminster, the day of , in the year of our Lord .

[*The following indorsement must be made on the writ:*] This writ was issued by *P. A.* [*plaintiff's attorney's name in full*] of [*place of his abode in full: also if sued out as agent for an attorney in the country, here say,* "as agent for *A. A.* of "] attorney for the said *A. B.* [*or if sued out by the plaintiff in person,* "This writ was issued in person by the plaintiff within named, who resides at ," *mentioning the city, town or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such there be.*]

The plaintiff claims £ [*the amount of the debt claimed from the garnishee*], and £ for costs, and if the amount thereof be paid to the plaintiff or his attorney within four days from the service hereof, further proceedings will be stayed.

[*Within three days after the service fill up the following indorsement:*] This writ was served by me *X. Y.* on *C. D.* on the day of , 18 .

25.—DECLARATION thereon.*

In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas."]

The day of , A.D. .

(*Venue.*)—*A. B.*, by , his attorney [*or* "in

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* See p. 268, *ante*.

person"], sues *E. F.* by a writ issued forth of this Court, in these words, Victoria, &c. [*copy the writ*], and the said *E. F.* has appeared to the said writ, and the said *A. B.*, by his attorney aforesaid, says that the said debt due from the said *E. F.* to the said *C. D.* is for, &c. [*here state the debt as in a declaration in ordinary cases,*] and the said *A. B.* prays that execution may be adjudged to him accordingly for the said £ , and for costs of suit in this behalf.

26.—PLEA* thereto.

In the Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas."]
The day of , A.D. .

E. F. ats. *A. B.* } The said *E. F.*, by , his attorney, says, that he never was indebted to the said *C. D.* as alleged [*or plead such other defence or several defences as in other cases.*]

27.—ISSUE thereon.

[*Copy the declaration and pleadings, and conclude thus:*] Therefore let a jury come, &c.

28.—POSTEA thereon.

[*The same as in ordinary cases, omitting the assessment of damages.*]

29.—JUDGMENT for Plaintiff therein.

[*The same as in ordinary cases to the statement of the judgment, which may be thus:*] "Therefore it is considered that the said *A. B.* have execution against the said *E. F.* for the said £ , the amount [*or* "part of the amount"] of the said debt due from him to the said *C. D.*, to satisfy [*or* "towards satisfying," *if the debt be less than the judgment debt*] the said £ , which the said *A. B.* on the said day

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* See a plea that the plaintiff had the judgment debtor in execution under a *ca. sa.*; and demurrer thereto, in *Jouralde* v. *Parker* (6 H. & N. 431; L. J. 30, Ex. 237).

of , 18 [*date of judgment against judgment debtor*], by the judgment of this Court recovered against the said *C. D.*; and it is further considered that the said *A. B.* do recover against the said *E. F.* £ for his costs of suit in this behalf."

30.—Fi. Fa. therein.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the sheriff of , greeting. We command you that you omit not by reason of any liberty of your county, but that you enter the same, and of the goods and chattels of *E. F.* in your bailiwick you cause to be made £ , the amount [*or* "part of the amount," *if the debt be more than the judgment debt*] of a debt due from the said *E. F.* to *C. D.*, to satisfy [*or* "towards satisfying," *if the debt be less than the judgment debt*] £ , which *A. B.* on the day of , 18 [*date of judgment against judgment debtor*], by the judgment of our Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas"] recovered against the said *C. D.*, and whereupon it has been adjudged by our said Court that the said *A. B.* should have execution against the said *E. F.* for the said £ , and also £ , which in our same Court were adjudged to the said *A. B.* for his costs of suit which he hath been put to on occasion of our writ sued out against the said *E. F.* at the suit of the said *A. B.* in that behalf, whereof the said *E. F.* is convicted, and have the said monies before us [*or in the Common Pleas,* "before our Justices," *or in the Exchequer,* "before the Barons of our Exchequer"] at Westminster, immediately after the execution hereof, to be rendered to the said *A. B.*, and that you do all such things as by the statute passed in the second year of our reign you are authorized and required to do in this behalf; and in what manner you shall have executed this our writ make appear to us [*or in the Common Pleas,* "to our Justices," *or in the Exchequer,* "to the Barons of our Exchequer," *as the case may be*] at Westminster, immediately after the execution hereof; and have you there then this writ. Witness , at Westminster, the day of , in the year of our Lord .

31.—CA. SA. therein.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the sheriff of , greeting. We command you that you omit not by reason of any liberty of your county, but that you enter the same, and take *E. F.*, if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us [*or in the Common Pleas*, "before our Justices," *or in the Exchequer*, "before the Barons of our Exchequer," *as the case may be*], at Westminster, immediately after the execution hereof, to satisfy *A. B.* £ the amount [*or* "part of the amount," *if the debt be more than the judgment debt*] of a debt due from the said *E. F.* to *C. D.*, and for the levying of which it has been adjudged by our Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas,"], that the said *A. B.* should have his execution against the said *E. F.*, to satisfy [*or* "towards satisfying," *if the debt be less than the judgment debt*] £ , which the said *A. B.* on [*the date of the judgment against the judgment debtor*], by the judgment of the said Court recovered against the said *C. D.*, and further to satisfy the said *A. B.* £ , which in our same Court were adjudged to the said *A. B.* for his costs of suit which he hath been put to on occasion of our writ sued out against the said *E. F.* at the suit of the said *A. B.* in that behalf, whereof the said *E. F.* is convicted; and have you there then this writ. Witness , at Westminster, the day of , in the year of our Lord .

32.—JUDGMENT for Plaintiff after Verdict that a Mandamus do issue, under Section 71 of the Common Law Procedure Act, 1854.*

[*The same as in the ordinary form of an entry of a judgment to the end of the postea, and then thus:*] Therefore it is considered that a writ of mandamus do issue commanding the defendant to [*here state the duty to be performed or the thing to be done, as claimed by the declaration*]; and it is also considered that the plaintiff do recover of the defendant the said

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* See p. 272, *ante*. And for observations upon the mode of proceeding for a mandamus, see pp. 270—272, *ante*.

monies by the justices [*or* "by the judge" or "baron"] aforesaid in form aforesaid above assessed, and also £ for his costs of suit in this behalf.

[*In the margin of the judgment opposite the first words*, "Therefore it is considered, &c.," *write* "judgment signed the day of , 18 ," *inserting the day of signing final judgment.*]

33.—WRIT OF INQUIRY to ascertain the Expense incurred by the doing of an Act, and for the doing of which a Mandamus was issued.*

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the sheriff of , greeting. Whereas upon an application by *A. B.*, the plaintiff in an action against *C. D.* in our Court of Queen's Bench [*or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be*], at Westminster, our said Court did, on the day of , A.D. [*date of order*], direct that [*state the terms of the order directing the act to be done at the defendant's expense*]; and the said *A. B.* [*or* "and *E. F.*" *if another person than the plaintiff has been appointed by the Court to do the act*] has done the said act so directed to be done; and in order to enable our said Court to ascertain the amount of the expense of the doing the same, we command you that, by the oath of twelve good and lawful men of your bailiwick, you diligently inquire what is the amount of the expenses incurred by the said *A. B.* [*or* "by *E. F.*" *as the case may be*] in the doing of the said act, and that you send to us [*or in the Common Pleas*, "to our justices," *or in the Exchequer*, "to the barons of our Exchequer,"] at Westminster, on the day of now next ensuing, the inquisition which you shall thereupon take, under your seal and the seal of those by whose oath you shall take that inquisition, together with this writ. Witness [*name of Chief Justice, or in Exchequer of Chief Baron*], at Westminster, the day of , in the year of our Lord .

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* This writ may be issued under the 74th section of the Common Law Procedure Act, 1854. See p. 272, *ante*.

34.—WRIT OF EXECUTION IN DETINUE, under Section 78 of the Common Law Procedure Act, 1854, for the Return of the Chattel detained, and for a Distringas until returned, separate from a Writ for Damages or Costs.†

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the sheriff of , greeting. We command you that you omit not by reason of any liberty of your county, but that you enter the same and without delay you cause the following chattels, that is to say [*here enumerate the chattels recovered by the judgment for the return of which execution has been ordered to issue*], to be returned to *A. B.*, which the said *A. B.* lately in our Court before us [*or in the Common Pleas*, "before our justices," *or in the Exchequer*, "before the barons of our Exchequer"] at Westminster, recovered against *C. D.* in an action for the detention of the same, whereof the said *C. D.* is convicted.* And we further command you, that if the said chattels cannot be found in your bailiwick you omit not by reason of any liberty of your county, but that you enter the same and distrain the said *C. D.* by all his lands and chattels in your bailiwick, so that neither the said *C. D.* nor any one for him do lay hands on the same until the said *C. D.* render to the said *A. B.* the said chattels; and in what manner you shall have executed this our writ make appear to us [*or in the Common Pleas*, "to our justices," *or in the Exchequer*, "to the barons of our Exchequer"] at Westminster, immediately after the execution hereof, and have you there then this writ. Witness , at Westminster, the day of , in the year of our Lord .

35.—THE LIKE, but instead of a Distress until the Chattel is returned, commanding the Sheriff to levy on Defendant's Goods the assessed Value of it.

[*Proceed as the preceding form until the*, and then thus:*] And we further command you, that if the said chattels cannot be found in your bailiwick you

† See p. 273, *ante*.

omit not by reason of any liberty of your county, but that you enter the same, and of the goods and chattels of the said *C. D.* in your bailiwick you cause to be made £ (*the assessed value of the chattels*), whereof the said *C. D.* is also convicted, and that in the execution of this our last-mentioned command you do all such things as by the statute passed in the second year of our reign you are authorized and required to do in this behalf; and in what manner you shall have executed this our writ make appear to us [*or in the Common Pleas*, "to our justices," *or in the Exchequer*, "to the barons of the Exchequer," *as the case may be*] at Westminster, immediately after the execution hereof, and have you there then this writ. Witness , at Westminster, the day of , in the year of our Lord .

36.—INDORSEMENT on Writ of Summons of Claim of a Writ of Injunction under Section 79 of the Common Law Procedure Act, 1854.

The plaintiff intends to claim a writ of injunction to restrain the defendant from [*here state concisely for what the writ of injunction is required, as, for example, thus:*] "felling or cutting down any timber or trees, standing, growing, or being in or upon the land and premises at , in the county of , and from committing any further or other waste or spoil in or upon the said land and premises." And take notice, that in default of the defendant's entering an appearance, as within commanded, the plaintiff may, besides proceeding to judgment and execution for damages and costs, apply for and obtain such writ.

CAMPBELL,
JOHN JERVIS,
FRED. POLLOCK,
J. PARKE,
E. H. ALDERSON,
C. CRESSWELL,
W. ERLE,
SAML. MARTIN,
CHARLES CROMPTON,
R. B. CROWDER.

27th November, 1854.

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* *Ante*, p. 275.

REGULA GENERALIS, November 26, 1855.

INDORSEMENTS ON WRITS UNDER THE SUMMARY PROCEDURE ON BILLS OF EXCHANGE ACT, 1855.

Monday, November 26th, 1855.

Ante, pp. 328—335.

The indorsements on writs under this act may be in the following form:—

This writ was issued by *E. F.*, of &c., attorney for the plaintiff. *Or* by *A. B.*, who resides at [*mention the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence*].

The plaintiff claims £ , principal and interest [*or* pounds, balance of principal and interest], due to him as the payee [*or* "indorsee"] of a bill of exchange [*or* "promissory note"] of which the following is a copy:—

[*Here copy bill of exchange or promissory note, and all indorsements upon it.*]

"And also shillings for noting [*if noting has been paid*], and £ for costs."* And if the amount thereof be paid to the plaintiff or his attorney within four days from the service hereof, further proceedings will be stayed.

NOTICE.

Take notice, that if the defendant do not obtain leave from one of the judges of the courts within twelve days after having been served with this writ, inclusive of the day of such service, to appear thereto, and do "not"* within such time cause an appearance to be entered for him in the court out of which this writ issues, the plaintiff will be at liberty, at any time after the expiration of such twelve days, to sign final judgment for any sum not exceeding the sum above claimed, and the sum of £ for costs, and issue execution for the same.

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* These inverted commas mark the alterations introduced by this rule in the indorsement given by the statute, Sched. (A), (*ante*, p. 334).

Leave to appear may be obtained on an application at the Judges' Chambers, Serjeants' Inn, London, supported by affidavit,* showing that there is a defence to the action on the merits, or that it is reasonable that the defendant should be allowed to appear in the action.

Indorsement to be made on the Writ after Service thereof.

This writ was served by *X. Y.* on *L. M.* [the defendant], on *Monday*, the day of 186 , by *X. Y.*

By the JUDGES.

N.B.—No other claim than a claim on a bill of exchange or promissory note is to be included in writs issued under the Summary Procedure on Bills of Exchange Act, 1855.†

REGULA GENERALIS.

Thursday, May 8, 1856.

IT IS ORDERED, that in lieu of Rule 164 of the Practice Rules of Hilary Term, 1853, the following be substituted:—"Service of pleadings, notices, summonses, orders, rules, and other proceedings, shall be made before 7 o'clock p.m., except on Saturdays, when it shall be made before 2 o'clock p.m. If made after 7 o'clock p.m. on any day, except Saturday, the service shall be deemed as made on the following day; and if made after 2 o'clock p.m., on Saturday, the service shall be deemed as made on the following Monday." Ante, p. 388.

CAMPBELL,
JOHN JERVIS,
FRED. POLLOCK,
C. CRESSWELL,
W. ERLE,
CHARLES CROMPTON,
R. B. CROWDER,
J. WILLES,
E. H. ALDERSON,
SAMUEL MARTIN,
G. BRAMWELL.

This rule was made for the benefit of the clerks in the Plea Office, and was not intended to alter the rights of the parties, consequently, where time to plead expires on a Saturday, the defend-

* A defendant is entitled to appear and defend, without any affidavit of ground of defence, upon bringing into court the amount indorsed on the writ. See p. 330, *ante*.

† But see R. G., H. T. 1858 (*post*, p. 461).

ant has till eleven o'clock on the following Monday (when the Judgment Office is opened), during which time he may deliver his pleas (*Connelly* v. *Bremner*, L. R. 1, C. P. 557).

REGULÆ GENERALES.

Easter Term, 1857.

It is ordered, that plaintiffs suing in contract for £20 or less, may, if they claim costs, indorse on the writ of summons the following notice:—

> "Take notice, that if judgment be signed for default of appearance, the plaintiff will without summons apply to a judge for his costs of suit, unless before such judgment you shall give notice to him, or his attorney, that you intend to oppose such application."

And it is further ordered, that if the defendant give such notice, the plaintiff shall proceed by summons and order.

But if the defendant give no such notice, the plaintiff may produce such indorsement to a judge at chambers for an order for costs, *ex parte*, and if the judge shall sign his name to the indorsement, such signature shall be an order for costs, and the master may tax them thereon accordingly. In case of any application for costs without such indorsement, the plaintiff shall not be entitled to more costs than if he had made such indorsement, unless a judge shall otherwise order.

This notice must be in writing under R. G., H. T. 1853, r. 161, *ante*, p. 388; *Woodward* v. *North* (5 H. & N. 790; L. J. 29, Ex. 470).

Entry of Satisfaction on Judgments.

Ante, p. 373. Upon a satisfaction piece duly signed and attested in accordance with the 80th Rule of Hilary Term, 1853, being presented to the clerk of the judgments of the Masters in the Court in which the judgment has been signed, he shall file the same and enter satisfaction in the judgment book against the entry of the said judgment, and no roll shall be required to be

carried in for the purpose of entering satisfaction on a judgment.

CAMPBELL,	E. V. WILLIAMS,
A. E. COCKBURN,	J. WILLES,
FRED. POLLOCK,	SAMUEL MARTIN,
W. ERLE,	G. BRAMWELL,
CHARLES CROMPTON,	W. F. CHANNELL.

April 23, 1857.

REGULA GENERALIS.

As to Claims on Bills of Exchange, &c.

HILARY TERM, 1858.

WHEREAS by the Rule of Michaelmas Term, 1855, with respect to indorsements on writs issued under the Bills of Exchange Act, 1855, it was, amongst other things, ordered "that no other claim than a claim on a bill of exchange or promissory note should be included in writs under the Summary Procedure on Bills of Exchange Act, 1855:" Ante, p. 458.

And whereas it is expedient that the said rule should be explained and amended: It is hereby ordered, that where a defendant obtains leave to appear according to the said act, and enters appearance to any such writ according to the said Rule of Michaelmas Term, 1855, the plaintiff may include in his declaration, together with a count on the bill of exchange or promissory note (as the case may be), a count upon the consideration, if any, between the plaintiff and defendant for the bill of exchange or promissory note, and deliver a particular of demand accordingly.

(Signed)	CAMPBELL,	SAMUEL MARTIN,
	A. E. COCKBURN,	R. B. CROWDER,
	FRED. POLLOCK,	J. WILLES,
	J. T. COLERIDGE,	G. BRAMWELL,
	WM. WIGHTMAN,	W. H. WATSON,
	W. ERLE,	W. F. CHANNELL,
	E. V. WILLIAMS,	J. BARNARD BYLES.

Read in Court, January 30, 1858.

This rule still leaves the addition, in the declaration, of counts upon causes of action other than the consideration, between the

parties, for the bill or note, an irregularity, in the nature of a variance after a special indorsement upon an ordinary writ of summons; and this it only profits a defendant to complain of in cases where he has a good defence to the count on the bill, and is therefore entitled, in the event of his succeeding thereon, to ask for the general costs up to declaration, whatever may be the event of the issues upon the other counts.

See as to amendments, *Knight* v. *Pocock* (17 C. B. 177); *Leigh* v. *Baker* (2 C. B., N. S. 367).

REGULA GENERALIS.

As to division into Paragraphs of Special Cases, &c..

HILARY TERM, 25TH VICTORIA.

IT IS ORDERED, that, from and after the first day of Easter Term next inclusive, every Special Case, Special Verdict, and Bill of Exceptions, set down in any of the Superior Courts of Common Law, shall be divided into paragraphs, which, as nearly as may be, shall be confined to a distinct portion of the subject, and every paragraph shall be numbered consecutively.

And that the Masters on taxation do not allow the costs of drawing and copying any Special Case, Special Verdict, and Bill of Exceptions, not in substance in compliance with this Rule, without the special order of the Court.

A. E. COCKBURN,
W. ERLE,
FRED. POLLOCK.

January 21, 1862.

This rule applies to evidence and documents set out at length in an appendix to a special case (*Hadley* v. *Peaks*, L. R. 1, Q. B. 444).

REGULA GENERALIS.

*As to Proceedings on Appeals.**

TRINITY TERM, 1867.

IT IS ORDERED that on appeal from one of the Superior Courts, such Court shall have power to allow

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* As to the occasion and object of this rule, see R. G., T. T. 1853, r. 26, n. (*ante*, p. 435).

interest for such time as execution has been delayed by the proceedings in appeal for the delaying thereof; and the Master on taxing the costs may compute such interest without any rule of Court or order of a Judge for that purpose.

And be it ordered that in lieu of the form No. 21 in the Rule of Michaelmas Vacation, 1854,* the following may be the form of a judgment of Court of Appeal in Exchequer Chamber on a disposal of the appeal in the plaintiff's favour where judgment for him had been given in the Court below, under the 41st and 42nd sections of the Common Law Procedure Act, 1854 [*copy the case for the appeal as stated by the parties, and then proceed thus:*] Afterwards on [*the day of giving judgment of Court of Appeal*], in the Court of Exchequer Chamber of our Lady the Queen before the Justices of the Common Bench of our Lady the Queen and the Barons of her Exchequer; [*or if the appeal be from the Common Pleas, say:* "before the Justices of our Lady the Queen, assigned to hold Pleas in the Court of our Lady the Queen before the Queen herself and the Barons of her Exchequer;" *or if the appeal be from the Exchequer, say:* "before the Justices of our Lady the Queen, assigned to hold Pleas in the Court of our Lady the Queen, before the Queen herself and the Justices of the Common Bench of our said Lady the Queen"], come the parties aforesaid by their respective attorneys aforesaid; and the said Court of Appeal decide that, &c. [*state the decision of the Court upon the questions raised by the case on appeal*]. And it is considered by the said Court of Appeal that the plaintiff do recover against the defendant £ for his damages and his costs, which the plaintiff hath sustained and expended by reason of the delay of execution on pretence of the proceedings in the said appeal, and that the plaintiff have execution thereof.

(Signed) A. E. COCKBURN, WM. BOVILL, FITZROY KELLY, SAMUEL MARTIN, J. S. WILLES, G. BRAMWELL, W. F. CHANNELL, J. BARNARD BYLES, COLIN BLACKBURN, H. S. KEATING, JNO. MELLOR, WM. SHEE, MONTAGUE SMITH, ROBERT LUSH.

6th June, 1867.

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* *Ante*, p. 448.

REGULÆ GENERALES.

As to the Jurisdiction of the Common Law Masters at Chambers.

MICHAELMAS TERM, 1867.

Ante, p. 345. WHEREAS, by the statute made and passed in the Session of Parliament held in the 30th and 31st years of the reign of her Majesty, intituled "An Act to provide for the better dispatch of business in the Chambers of the Judges of the Superior Courts of Common Law," It is enacted, that it shall be lawful for a majority of all the Judges of the said Courts, which majority shall include the two Chief Justices, or one of the Chief Justices, and the Chief Baron, from time to time to make and publish General Rules for certain purposes therein mentioned.

It is therefore ordered, that the Masters of the said Courts of Common Law at Westminster be, and each of them is hereby empowered and required to do all such things, and transact all such business, and exercise all such authority and jurisdiction in respect of the same, as by virtue of any statute or custom, or by the Rules and Practice of the said Courts, or any of them respectively, were at the time of the passing of the said Act, and are now done, transacted, or exercised by any Judge of the said Courts sitting at Chambers, except in respect of matters relating to the liberty of the subject, and except (unless by consent of the parties) in respect of the following proceedings and matters, that is to say :—

All matters relating to Criminal Proceedings ;

The removal of Causes from Inferior Courts, other than the removal of judgments for the purpose of having Execution ;

Prohibitions and Injunctions ;

The referring of Causes under the Common Law Procedure Act, 1854 ;

The rectifying of omissions or mistakes in the Register under the Joint Stock Companies Acts ;

Interpleader—other than such matters arising in Interpleader, as relate to practice only ;

Discovery—whether by inspection of documents, interrogatories or otherwise ;

Reviewing taxation of costs;
Staying proceedings after verdict;
Acknowledgments of married women;
Leave to sue in formâ pauperis;
Orders charging Stock, Funds, Annuities, or Share or Dividends, or annual produce thereof.

That in case any matter shall appear to the Master to be proper for the decision of a Judge, the Master may refer the same to a Judge, and the Judge may either dispose of the matter or refer the same back to the Master with such directions as he may think fit.

That appeals from the Master's order or decision shall be made by summons, such summons to be taken out within four days after the decision complained of, or such further time as may be allowed by a Judge or Master.

The appeal to be no stay, unless so ordered by a Judge or Master.

The costs of such appeal shall be in the discretion of the Judge.

That all summonses be issued by a Judge as heretofore; but that orders by the Masters be made in their own names.

That the scale of costs for all matters done by and before the Masters shall be the same as are fixed for business done by and before the Judges.

That the same fees shall be taken in respect of business transacted before the said Masters at chambers, as are now taken when the same business is transacted before a Judge.

That these Rules take effect on the 1st January, 1868.

A. E. COCKBURN,
W. BOVILL,
FITZROY KELLY,
SAMUEL MARTIN,
J. S. WILLES,
G. BRAMWELL,
W. F. CHANNELL,
J. BARNARD BYLES,
COLIN BLACKBURN
H. S. KEATING,
JNO. MELLOR,
G. PIGOTT,
WILLIAM SHEE,
MONTAGUE SMITH,
ROBERT LUSH.

Read in the Courts of Queen's Bench, Common Pleas, and Exchequer of Pleas, the 25th day of November, 1867.

DIRECTIONS TO THE MASTERS OF THE COURTS.*

(In lieu of Directions now in force.)

Hilary Term, 1853.

1. Between the 1st day of September and the 24th day of October in each year, one of the Masters of the Courts of Queen's Bench, Common Pleas, or Exchequer shall have authority to tax bills of costs, take references and perform other necessary and immediate matters arising in or appertaining to any or either of the said courts at the office of his own court; and for such purpose one of the masters shall attend on certain days in each week, as may be found necessary, and of which due notice shall be affixed in the judges' chambers and in the respective offices of the masters of each court; and such master shall be considered as the vacation master.

The court will not ordinarily interfere with the taxation of costs, except to correct some error of *principle* into which the master may have fallen (*Burton* v. *Burton*, L. J. 29, Exch. 291).

As to costs, where a general verdict passes for the plaintiff on several counts see *Burton* v. *Lowe* (2 Weekly Notes, 1867, p. 160; 16 L. T. N. S. 385, C. P. E. T.).

2. In order to diminish as much as possible the costs arising from the copying of documents to accompany the briefs of counsel, the masters are to allow only the copying of such documents, or such parts of documents, as they may consider necessary for the instruction of counsel, or for use at the trial.

3. No fee to counsel to be allowed on writs of trial, except on trials before the judge of the Sheriff's Court of London,† or of other courts of record where attorneys are not allowed to practise, and then one guinea only.

Writs of trial have been abolished by 30 & 31 Vict. c. 142, s. 6, which came into operation on the 1st January, 1868; see note to R. G., H. T. 1853, r. 34 (*ante*, p. 360).

4. The masters shall have discretion in all cases to allow

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* As to what fees to counsel will be allowed on taxation, see *Kidston* v. *Empire Marine Insurance Company* (16 L. T. N. S. 286; C. P. E. T. 1867). and *Hughes* v. *Birkenhead Improvement Commissioners* (16 L. T. N. S. 358, Q. B. E. T. 1867).

† This exception did not apply to trials before the Secondary of London.

as between party and party the fees of counsel or special pleader for drawing pleadings or other proceedings, whether special or otherwise, and advising.

5. When judgment is signed on a cognovit, or on a judge's order authorizing the plaintiff to sign judgment, no declaration to ground judgment shall be necessary or allowed on the taxation of costs.

6. The costs of attendance by counsel or special pleader before a judge at chambers shall in no case be allowed as between party and party, unless the judge shall certify for such allowance.

7. In all actions on contract, other than cases wherein by reason of the nature of the action no writ of trial can by law be issued,* where the sum recovered † or paid into court, and accepted by the plaintiff in satisfaction of his demand, or agreed to be paid on the settlement of the action, shall not exceed twenty pounds (without costs), the plaintiff's costs as against the defendant shall be taxed according to the lower scale of allowances in the schedule of costs hereunto annexed: Provided that in case of trial before a judge of one of the superior courts, or judge of assize, if the judge shall certify on the *postea* that the cause was proper to be tried before him, and not before a sheriff or judge of an inferior court, the costs shall be taxed on the higher scale.

In cross actions by C. against R. to recover the amount of a surgeon's bill where the writ was indorsed for more than 20*l.*; and by R. against C. for damages for negligence, the parties before trial agreed in writing as follows: "Taxed costs of C. to be paid in both actions; C. to be paid 15*l.* in addition to what is paid into court (2*l.* 7*s.* 6*d.*); R. to withdraw, in writing, the letter offensive to C." A judge's order was thereupon obtained by C., and drawn up in the following terms: "I do order that upon payment of 15*l.* beyond the amount paid into court for which this action was brought, together with costs to be taxed and paid forthwith, all further proceedings in this cause be stayed." It was thereupon held, that whatever might have been the intention of the parties to the agreement, the master on taxation of costs could only act on the judge's order, which brought the case within the above rule, and that in the first action the plaintiff's costs against the defendant should have been taxed on the lower scale (*Cream* v. *Ray*, *Ray* v. *Cream*, L. J. 30, Exch. 110).

This rule applies to a successful defendant in an action within its terms (*Copley* v. *Hemingway*, 15 C. B. N. S. 447; L. J. 33, C. P. 152).

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* An action on a contract removed from the County Court to the Superior Court at the instance of the defendant is within this exception, for as there was no writ of summons, and consequently no indorsement thereon, no writ of trial could issue (*Perry* v. *Bennett*, 14 C. B. N. S. 402; L. J. 33, C. P. 43). See now Direction 3, n. (*supra*).

† This has been held to include money paid into court upon a plea of *tender before action* (*Cooch* v. *Maltby*, L. J. 23, Q. B. 305, Ball Court).

Now the stat. 30 & 31 Vict. c. 142, s. 5 (see C. L. P. A. 1860, s. 34, n., *ante*, p. 323), in an action of contract deprives the plaintiff of costs in every case where the sum recovered does not exceed twenty pounds, unless the judge certify or make an order allowing costs.

8. Where, in like actions, the sum indorsed on the summons shall be more than twenty pounds, but the plaintiff fails to recover more than that sum, and the judge does not certify as aforesaid, the plaintiff's costs against the defendant, whether between party and party or as between attorney and client, shall be taxed as upon a writ of trial before a judge of a court of record where attorneys are not allowed to act as advocates, as hereinafter provided for, but the defendant's costs, if any, are to be taxed upon the higher scale; provided that, in cases triable before the sheriff or judge of an inferior court, where the judge shall refuse to make an order for trial, the judge may, if he shall think fit, direct at the time of such refusal on what scale the costs of each party shall be taxed, and in default of such direction the costs of both parties shall be taxed on the higher scale.

Action to recover 28*l.* 19*s.* 4*d.*, for goods sold and delivered: Pleas; except as to 26*l.* 10*s.* 6*d.*, never indebted, and as to 26*l.* 10*s.* 6*d.*, a tender. The jury found for the defendant on the plea of tender, but that the plaintiff was entitled to 2*l.* 8*s.* 10*d.* more. The plaintiff did not obtain a certificate that the cause was proper to be tried in a superior court. It was thereupon held that under the above rule the plaintiff's costs were to be taxed on the lower scale. *James* v. *Vane* (*Lord*), 2 E. & E. 883; L. J. 29, Q. B. 169.

9. At the head of every bill of costs taken to the taxing officer to be taxed, it shall be stated whether the sum recovered, accepted, or agreed to be paid exceeds the sum of twenty pounds, or not, in the following form:—

Debt above twenty pounds.
Debt twenty pounds or under.

*General Allowance for Plaintiffs and Defendants; and in Cases under £20 as well between Attorney and Client as between Party and Party.**

Writs.	Above £20 £ s. d.	Under £20 £ s. d.
Summons	0 12 6	0 10 0
Concurrent summons	0 10 0	0 7 6

* The scale of costs for matters done before the masters, under 30 & 31 Vict. c. 61 (*ante*, p. 345), is the same as herein fixed for business done before the judges, R. G., M. T. 1867 (*ante*, p. 465). Where, by an act of parliament, *e. g.* the Lands Clauses Act, 1845, s. 52, the taxation of the costs of proceedings is referred to a master of one of the courts as a *persona designata*, the courts have no power to review the taxation so made (*In re Owen and L. & N. W. Railway Company*, L. R. 3 Q. B. 54, where all the previous cases are collected and reviewed). It would seem that in such cases the masters are not bound by the above scale.

WRITS—(*continued*).	Above £20 £	s.	d.		Under £20 £	s.	d.
Renewed summons	0	10	0	..	0	7	6
Capias	0	12	6	..		—	
Alias	0	10	0	..		—	
Pluries	0	10	0	..		—	
Capias ad satisfaciendum	0	12	0	..	0	11	0
Renewed ca. sa.	0	9	6	..	0	8	6
Ca. sa. for the residue	0	14	0	..	0	13	0
Renewed	0	11	6	..	0	10	6
Fieri Facias	0	12	0	..	0	11	0
Renewed	0	9	6	..	0	8	6
Renewed for the residue	0	14	0	..	0	13	0
Renewed	0	11	6	..	0	10	6
Fi. fa. de bonis ecclesiasticis	0	14	6	..		—	
Renewed	0	12	0	..		—	
Habere facias pos. and fi. fa. or ca. sa. for costs in one writ	0	18	0	..		—	
Habere fa. pos. alone	0	15	0	..		—	
Special indorsements on writs of summons	0	5	0	..	0	2	6
Writ of revivor	0	12	6	..	0	10	0
Ejectment	0	15	0	..		—	
Of trial, exclusive of fee		—		..	0	8	0
Subpœna ad test.	0	7	0	..	0	5	0
Subpœna duces tecum	0	9	0	..	0	7	0
If above four folios, additional per folio	0	0	8	..	0	0	4
Exigi facias	1	1	0	..		—	
Capias utlagatum	1	1	0	..		—	
Elegit, Nos. 9, 10, and 11, in New Rules	0	15	0	..		—	
Ditto, Nos. 12, 13, and 14	1	0	0	..		—	
Attachment	0	12	0	..		—	
Detainer	0	12	6	..		—	
Habeas corpus obtained by plaintiff, including allowance	1	0	0	..		—	
Procedendo	0	15	0	..		—	
Venditioni exponas	0	13	6	..		—	
Supersedeas, if not issued by a prisoner	0	11	0	..		—	

COPY AND SERVICE OF WRITS.

Of summons, the defendant being served in London, Middlesex, or Surrey, within two miles of the place of business of the attorney, for each defendant	0	5	0	..	0	5	0
If beyond that distance, additional for every mile, but in cases under £20 not to exceed ten miles	0	1	0	..	0	0	6
If the defendant should be served in any other county, the same allowance, but the distance to be calculated from the office of the attorney employed to effect service.							
Of writ of revivor, the same as summons.							
Of writ of ejectment, the same as of writ of summons for each defendant. And in addition, for every folio of copy beyond three	0	0	4	..		—	

COPY AND SERVICE OF WRITS—(*continued*).	Above £20 £ s. d.		Under £20 £ s. d.
Correspondent's charges for service of writ, including affidavit of service, and exclusive of mileage in cases in which the fixed sum for costs does not apply	0 18 0	..	0 12 0
The like for service of subpœnas ..	0 8 6	..	0 5 0
Extra for subpœnas duces tecum ..	0 2 0	..	0 2 0
Notice of writ for service on a foreigner out of jurisdiction	0 3 0	..	0 3 0
Agent's charges according to circumstances, &c.			
In cases in which the defendant shall avoid service, and an order shall be made to proceed, a sum will be allowed for attendances to serve, according to circumstances.			
Of subpœna ad test.	0 5 0	..	0 3 0
Of subpœna duces tecum	0 7 0	..	0 5 0
Mileage as before.			

INSTRUCTIONS.

Instructions to sue or defend for pleadings, special affidavits where allowed, and to counsel on special matters ..	0 6 8	..	0 3 4
To counsel in common matters ..	0 3 4	..	0 3 4
For brief	0 13 4	..	0 6 8
If difficult, and many witnesses or documents, discretionary	—	..	Nil.
For every suggestion	0 6 8	..	0 3 4
For plea of suggestion	0 6 8	..	0 3 4
For issue in fact by consent	0 13 4	..	0 6 8
For suggestion to revive, or writ of revivor, when no rule necessary ..	0 6 8	..	0 3 4
For rule for writ of revivor, when necessary	0 6 8	..	0 3 4
For proceeding in error	0 6 8	..	—
To defend for executor, after suggestion of death of original defendant ..	0 6 8	..	0 3 4
For agreement of damages	0 6 8	..	0 3 4
For grounds of error	0 6 8	..	—
For assignment of errors after notice ..	0 6 8	..	—
For confession of action in ejectment as to the whole or in part	0 6 8	..	—
To reduce special jury	0 13 4	..	—

DRAWING PLEADINGS, &c.

Declarations inclusive of instructions and ingrossing, and of attendance to file or deliver	1 5 0	..	0 10 0
If above ten folios, for every folio ..	0 1 0	..	0 1 0
One or more pleas, if three folios or under, exclusive of instructions, but inclusive of ingrossing	0 4 0	..	0 3 0

DRAWING PLEADINGS, &c.— (*continued*).	Above £20 £	s.	d.	Under £20 £	s.	d.
If above three folios, for every folio drawing	0	1	0	0	1	0
Joinder of issue, inclusive of ingrossing	0	4	0	0	3	0
Demurrer, inclusive of ingrossing ..	0	4	0	0	3	0
Joinder in demurrer, inclusive of ingrossing	0	4	0	0	3	0
Marginal statement of matter of law for argument, exclusive of copies for the judges	0	6	8	0	3	4
Replications, new assignments, grounds of error, assignment of errors, pleas to assignment of errors, and other pleadings, the same as the foregoing charges for pleas.						
Issue or demurrer book	0	6	8	0	3	4
Record	Nil.			Nil.		
Postea, when drawn by attorney, including ingrossing, for every folio ..	0	1	0	0	1	0
Judgment, whether by default or final.	0	3	4	0	3	4
Authority to receive monies out of court	0	3	0	0	2	0
Suggestions, pleas to suggestions, and subsequent pleadings, of three folios or under, inclusive of ingrossment..	0	4	0	0	3	0
If above three folios, for every folio drawing	0	1	0	0	1	0
Issue for the trial of facts by agreement, for every folio..	0	1	0	0	1	0
Special case, per folio	0	1	0	0	1	0
Agreement of damages and copy, if five folios or under	0	6	8	0	3	4
Above five folios, for every folio drawing	0	1	0	0	1	0
And copy per folio	0	0	4	0	0	4
Drawing writ of inquiry	0	3	4		Nil.	
Special particulars of demand or set-off and copy, per folio	0	0	8	0	0	4
Short ditto and copy	0	5	0	0	2	6
Abstract of pleas, when necessary, and fair copy, and copy for judge ..	0	5	4	0	3	4
Bill of costs and copy for taxation, per folio	0	0	8	..	—	
Copy for the opposite party	0	0	4	..	—	
Drawing bill of costs and copy, per folio 4*d.*, not to exceed	..			0	4	0
Copy for the opposite party, per folio 4*d.*, not to exceed	..			0	4	0
Drawing and ingrossing common cognovit, and attendance thereon ..	0	13	4	0	6	8
If special and long	1	0	0	0	10	0
Replication accepting money out of court, in full of demand, inclusive of instructions	0	4	0	0	3	0
Similiter or joinder of issue to obtain order to try before sheriff	..			0	3	0

Ingrossing and Copying.	Above £20 £	s.	d.	Under £20 £	s.	d.
Declarations, above ten folios, per folio	0	0	4	0	0	4
Other pleadings before enumerated, above three folios, per folio	0	0	4	0	0	4
Issue (pleadings), if fifteen folios or under	0	5	0	—		
If above fifteen folios, for every folio	0	0	4	0	0	4
Issue (pleadings), if ten folios or under				0	3	4
Above ten folios, per folio				0	0	4
All proceedings on paper, per folio	0	0	4	0	0	4
The like on parchment, per folio	0	0	6	0	0	4
Judgments for non-appearance on specially-indorsed writs, or writs of revivor, and in ejectment, to be taken as nine folios, including the writ in actions above 20*l.*, and six folios under 20*l.*						
The allowance of 1*l.* 3*s.* 2*d.* for interlocutory judgments will be discontinued, and the drawing, entry, and other charges will for the future be according to this scale.						
The length of interlocutory and final judgments will be allowed as heretofore.						

Notices.						
To declare, reply, and subsequent pleadings, copy and service	0	4	0	0	3	0
By defendant to bring issue to trial, copy and service	0	4	0	0	3	0
For special jury to opposite attorney, copy and service, pursuant to section 109	0	5	0	0	3	0
The like to sheriff, pursuant to section 112	0	5	0	0	3	0
To executor or administrator of sole defendant deceased, to appear to writ and suggestion	0	5	0	0	3	0
To sheriff of renewal of execution, exclusive of any payment	0	5	0	0	3	0
To plaintiff in error to assign errors	0	5	0	0	3	0
Of discontinuance of error	0	4	0	0	3	0
Of confession of error	0	4	0	0	3	0
Of plaintiff's in error intention to proceed to personal representatives of defendant deceased	0	5	0	0	3	0
Of appearance when appearance duly entered and notice given on the day of appearance, but not otherwise	0	4	0	0	3	0
Of appearance to writ of revivor	0	5	0	0	3	0
To plead	0	4	0	0	3	0
Of declaration when necessary, copy and service	0	5	0	0	5	0
Of objection for misjoinder or non-joinder of plaintiff, copy and service	0	4	0	0	3	0

NOTICES—(*continued*).	Above £20 £	s.	d.	Under £20 £	s.	d.
To sheriff to discharge a prisoner out of custody, copy and service ..	0	5	0	0	4	0
Notice in ejectment to defend for part of premises and service	0	6	0	.—		
If above three folios, for every folio additional	0	1	0	—		
Notice of admission of right and denial of ouster by a joint tenant, &c. ..	0	6	0	—		
If above three folios, for every folio ..	0	0	4	—		
Discontinuance by claimant in ejectment and service	0	5	0	—		
Of confession of action of ejectment as to the whole or in part, and service .	0	10	0	-		
Of trial, inquiry, demand of residence of plaintiff, of authority for issuing writ, and all other common notices..	0	4	0	0	3	0
To admit or produce, if short	0	7	6	0	5	0
The like, if long	0	10	0	0	5	0
If very long and special, a larger allowance may be made in cases above 20*l.*						
Additional allowance for mileage, as upon the service of a writ.						
COPY AND SERVICE.						
Of special and common rules	0	5	0	0	4	0
Of special rule, above three folios, per folio additional	0	0	4	0	0	4
Of summons or order of a judge ..	0	3	0	0	3	0
Of order to charge a prisoner in execution	0	5	0	—		
Of master's note of receipt and of affidavits in error in fact	0	7	0	—		
Of master's note of receipt of error in law	0	5	0	—		
Mileage on services as upon a writ of summons.						
EJECTMENT.						
Instructions to sue, and examining deeds	0	13	4	—		
If a question of title	1	1	0	—		
ATTENDANCE.						
To search for appearance to writ of summons	0	3	4	0	3	4
Two searches will be allowed, if necessarily made.						
To obtain undertaking to appear to process	0	5	0	0	5	0
To give undertaking to appear ..	0	5	0	0	5	0
Deponent to be sworn (where allowed) for rules where no attendance in court,						

ATTENDANCE—(*continued*).	Above £20 £	s.	d.		Under £20 £	s.	d.
to enter exception to bail, to leave writ at sheriff's office, to obtain return to writ, to alter or amend pleadings, to file any proceeding, to obtain office copies, consent to any summons, for postea (if necessary), to set down case, or demurrer, each judge with demurrer book or special case, to deliver points to each judge, to ascertain if books delivered and other like attendances	0	3	4	..	0	3	4
To set down causes for trial	0	6	8	..	0	3	4
On each counsel with brief at trial, fee under twenty guineas, to reduce special jury, summons before a judge, and to pay money into court ..	0	6	8	..	0	3	4
On counsel with brief, fee twenty guineas and above	0	13	4	..		—	
To receive money out of court ..	0	10	0	..	0	6	8
Counsel with brief on motion, if above one guinea fee	0	6	8	..	0	3	4
If one guinea only	0	3	4	..	0	3	4
Consultation with counsel	0	13	4	..		Nil.	
Conference with counsel	0	6	8	..		—	
Fee on every record or writ of trial ..	0	6	8	..	0	3	4
For common jury panel	0	3	4	..	0	3	4
For special jury panel	0	6	8	..	0	3	4
To obtain names of viewers	0	6	8	..	0	3	4
To enter any suggestion on roll when necessary	0	3	4	..	0	3	4
Attending court cause made remanet..	0	13	4	..	0	6	8
Attending for fresh panels after remanet as before.							
Attendances incidental to agreement of amount of damages according to the circumstances.							
Attendance in pursuance of notice to admit	0	6	8	..	0	3	4
For every hour beyond one	0	6	8	..	0	3	4
Attending making admissions, except under special circumstances ..	0	6	8	..	0	3	4
On reference to master upon common matters, such as to compute upon a bill or bond	0	6	8	..	0	6	8
Special matters	0	13	4	..	0	6	8
For every hour after the first	0	6	8	..	0	3	4
If counsel in attendance, attorney attending	0	6	8	..	0	3	4
Above one hour	0	13	4	..	0	6	8
To attest confession in ejectment ..	0	6	8	..		—	
To file memorandum of error and obtain master's receipt	0	6	8	..	0	3	4
Assizes each day, exclusive of expenses, but inclusive of all matters transacted, except one attendance upon each counsel with brief	2	2	0	..		—	

ATTENDANCE—(*continued*).	Above £20 £	s.	d.		Under £20 £	s.	d.
Expenses, exclusive of travelling, for each day	1	1	0	..		—	
Travelling expenses, the amount actually and reasonably paid, but in no case exceeding 1*s.* per mile one way.							
If two causes, in each per day for attendance	1	11	6	..		—	
If three causes or more, each	1	1	0	..		—	
If more than one cause, expenses at 1*l.* 1*s.* each day, and travelling expenses to be divided equally.							
Clerk's attendance discretionary if more than one cause, or in special cases not exceeding per day, inclusive of expenses, except travelling	1	1	0	..		—	
In assize towns in which two lists are made, and in special jury causes, the attendance of the attorney will not be allowed from the commission day, but only from such period as his attendance became proper.							
On writ of inquiry or writ of trial at a distance, if no other business, inclusive of expenses, per day	2	2	0	..	1	1	0
If two cases, each	1	11	6	..	0	13	4
If more than two cases, each	1	1	0	..	0	13	4
Travelling expenses as before, and to be apportioned if more than one cause.							
In London or Middlesex or in same town, on trial or writ of inquiry, when cause in paper, and not tried, per day	0	13	4	..	0	6	8
On trial	1	1	0	..	0	13	4
Ditto, if occupied the whole day ..	2	2	0	..		—	
Managing clerk to conduct cause at a distance when only one cause per day	1	11	6	..	0	13	4
If more than one cause, each	1	1	0	..	0	10	6
Travelling and other expenses the same as attorney.							
Court on motion rule *nisi* granted ..	0	6	8	..	0	3	4
The like, on rule absolute after rule *nisi*	0	13	4	..	0	6	8
The like, previous to argument, per day	0	6	8	..	0	3	4
The like, in cases set down in the paper, not exceeding for a whole term ..	2	0	0	..	1	0	0
After term when sittings, not exceeding	1	0	0	..	0	10	0
Taxation on postea	0 13 4 to 1 0 0			..	0 3 4 to 0 6 8		
More according to time occupied.							
Ditto, costs of cause otherwise than on postea	0 6 8 to 0 13 4			..	0	3	4
Ditto, costs of judgment only, and ordinary interlocutory matters	0	3	4	..	0	3	4

	Above £20 £ s. d.	Under £20 £ s. d.
Briefs.		
Minutes of evidence	.. ..	0 13 4
Brief and one fair copy where cause tried before a judge of a Court of Record where attorneys are not allowed to act as advocates, not exceeding ..	.. ..	2 0 0
In the like case, fee to counsel and clerk	.. ..	1 3 6
For drawing, per folio	0 1 0 ..	—
Copying	0 0 4 ..	—
Term Fees and Letters.		
Proper business	0 13 0 ..	0 10 0
Agency	0 15 0 ..	0 12 0
Letters when no term fee proper business	0 3 0 ..	0 2 0
Agency	0 5 0 ..	0 3 0
Letters in interlocutory matters proper	0 2 0 ..	—
Agency	0 3 0 ..	—
In actions under 20*l.* no allowance will be made for "letters" for the vacation preceding the term in which a term fee shall be allowed.		
Letters.		
Letter before action and other letters ..	0 3 6 ..	0 2 0
Circular letters after the first	0 1 6 ..	0 1 0
Affidavits.		
Drawing special affidavits, per folio ..	0 1 0 ..	0 1 0
Engrossing same, exclusive of affidavits of increase	0 0 4 ..	Nil.
Common affidavits, of five folios or under, including engrossing and oath	0 6 0 ..	0 5 0
Affidavit of increase, including engrossing and oath	.. ..	0 5 0
Copy for the other side	.. ..	0 2 0
Searches.		
All common searches, exclusive of payment	0 3 4 ..	0 3 4
If very long	0 13 4 ..	0 6 8
Counsel.		
To attend reference to master, not exceeding, except on examination of witnesses	2 2 0 ..	Nil.
To settle special indorsement on writ ..	Nil.	Nil.
Warrant of Attorney.		
Costs of signing judgment	3 10 0 ..	—
Defendants.		
Appearance	0 7 0 ..	0 6 0
For each additional defendant, inclusive of payment	0 1 6 ..	0 1 6

DEFENDANTS—(*continued*).	Above £20 £ s. d.	Under £20 £ s. d.
A second summons and order for time to plead shall be allowed in special cases above 20*l.* when necessary.		
COUNSEL'S CLERK'S FEES.		
The fees to be allowed to counsel's clerk not to exceed as under:		
Upon a fee under 5 guineas	0 2 6	—
5 guineas and under 10 guineas ..	0 5 0	—
10 guineas and under 20 guineas ..	0 10 0	—
20 guineas and under 30 guineas ..	0 15 0	—
30 guineas and under 50 guineas ..	1 0 0	—
50 guineas and upwards	2 10 0	—
	per cent.	
ON CONSULTATIONS.		
Senior's clerk	0 7 6	—
Junior's clerk	0 2 6	—
On general retainer	0 10 6	—
On common retainer	0 2 6	—
On conference	0 5 0	—

Allowance to Witnesses.[*]	If resident in the town in which the cause is tried. £ s. d.	If resident at a distance from the place of trial. £ s. d.
Common witnesses, such as labourers, journeymen, &c., per diem ..	0 5 0	0 5 0 to 0 7 6
Master tradesmen, yeomen, and farmers, per diem .. .. from	0 7 6 to 0 10 0	0 10 0 to 0 15 0
Auctioneers and accountants, per diem	0 10 6 to 1 1 0	0 10 6 to 1 1 0
Professional men, per diem	1 1 0	—
Ditto, inclusive of all, except travelling expenses, per diem	—	2 2 0 to 3 3 0
Attornies or other clerks, per diem ..	0 10 6	0 15 0 to 1 1 0
Engineers and surveyors, per diem ..	1 1 0	1 1 0 to 3 3 0
Notaries, per diem	1 1 0	1 1 0

[*] See *Dowdell* v. *Royal Australian Steam Navigation Company* (3 E. & B. 902; L. J. 23, Q. B. 369); where the expenses of maintenance of the plaintiff (who was a material witness on his own behalf), after a verdict in his favour, and until a rule nisi for a new trial was disposed of, were allowed him.

An affidavit of increase ought not to state that the expenses charged for witnesses have been paid to them, unless they have been actually paid to them at the time when it is made; the fact of the money due to a witness for his attendance, having been set off against expenses incurred by the successful party in conveying him to the assize town, and keeping him there, is insufficient (*Cross* v. *Durrell*, L. J. 29, Ex. 473).

Allowance to Witnesses—(continued).

	If resident in the town in which the cause is tried. £ s. d.	If resident at a distance from the place of trial. £ s. d.
Gentlemen	1 1 0 with subpœna, but no daily allowance, except after the first day, and then a reasonable sum for refreshment and conveyance	1 1 0 per diem.
Esquires		
Bankers		
Merchants		
Females, according to station in life, per diem .. .. .. from	0 5 0 .. 0 10 0	0 5 0 to 1 0 0
Police inspector, per diem	0 5 0 ..	0 7 6 to 0 10 0
Police constable	0 3 0 ..	0 5 0 to 0 7 6

If the witnesses attend in one cause only, they will be entitled to the full allowance. If they attend in more than one cause they will be entitled to a proportionate part in each cause only.

The travelling expenses of witnesses shall be allowed according to the sums reasonably and actually paid, but in no case shall exceed 1*s.* per mile one way.

Miscellaneous.

Close copy of proceedings in agency cases, 4*d.* per folio, according to actual length.

In cases under 20*l.* no allowance will be made in respect of the following matters:—

Attending deponent to be sworn to affidavit.
Advice on evidence.
Maps, plans, or models.

For maps or plans, when used in cases above 20*l.*, from 1*l.* 1*s.* to 3*l.* 3*s.*

All other allowances will be made as heretofore, except so far as it may be necessary to reduce or increase the same conformably to the scale of fees published on the 24th November, 1852.*

CAMPBELL. T. J. PLATT.
JOHN JERVIS. W. ERLE.
FRED. POLLOCK. T. N. TALFOURD.
E. H. ALDERSON. SAML. MARTIN.
W. WIGHTMAN.

27th January, 1853.

* See *post*, p. 516.

WRITS AND NOTICES TO SHERIFFS.

The following are the modes of addressing Writs and Notices to the Sheriffs of the different Counties of England.

In *London* there are two sheriffs, and the writ is directed accordingly "To the sheriffs of London."

In *Middlesex* the two sheriffs of London act as sheriff, and in law constitute but *one* sheriff; the writ is directed accordingly "To the sheriff of Middlesex."

In the *counties palatine* writs are, by the Common Law Procedure Act, 1852, in cases within the provisions of that act, to be directed and delivered to the sheriffs: (s. 122, *ante*, p. 107.) Writs and notices may now, therefore, be addressed "To the sheriff of the county palatine of Lancaster," or "of Durham and Sadberge."

To the sheriffs of the following cities, writs and notices are to be addressed as follows:—"To the sheriff of the city of Bristol," "of Canterbury," "of Chester," "of Exeter," "of Gloucester," "of Lincoln," "of Norwich," "of Worcester," "of York."

Writs to be executed in the *city of Oxford* are addressed to the sheriff of the county.

The writ to the sheriff of Lichfield is thus addressed:—"To the sheriff of the city of Lichfield and the county of the same city."

The following is the direction of the writ and notices to towns which are counties of themselves:—"To the sheriff of the town and county of Haverfordwest," "of Kingston-upon-Hull," "of Newcastle-upon-Tyne," "of Nottingham," "of Poole," "of Southampton."

To the sheriff of Carmarthen writs must be directed "To the sheriff of the county of the borough of Carmarthen."

To the Cinque Ports the writ is directed thus:—"To our constable of our castle of Dover, or to his deputy or lieutenant."

In the *Isle of Ely* the writ is directed "To the sheriff of Cambridgeshire."

In the borough of *Southwark* the writ is directed "To the sheriff of Surrey."

To Berwick-upon-Tweed, writs are directed "To the sheriff of the county of the borough and town of Berwick-upon-Tweed."

To the coroners of a county, &c., the writ is directed thus:—"To the coroners of our county of ," or "of our city of ."

To Berwick, however, the writ is directed "To the coroner of the county of the borough and town of Berwick-upon-Tweed."

To elisors it is directed thus:—"To *A. B.* and *C. D.*, elisors appointed by our court of , in this behalf."

APPENDIX.

STATUTES

RELATING TO

PLEADING AND PRACTICE

IN THE

SUPERIOR COURTS OF COMMON LAW.

[5 & 6 Vict. c. 97.*]

An Act to amend the Law relating to Double Costs, Notices of Action, Limitations of Actions, and Pleas of the General Issue, under certain Acts of Parliament. [10th August, 1842.]

Whereas divers acts of parliament, public, local and personal, contain enactments or provisions relating to the recovery of double, treble, or other costs in certain cases, and to the pleading of the general issue and the giving any special matter in evidence at any trial to be had for any matter done in pursuance of or under the authority of the said acts, and to the giving of notice of action before any action shall be commenced: And whereas it is expedient that the law should be altered in such respects: Be it therefore enacted by the Queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that so much of any clause, enactment, or provision in any act or acts commonly called public local and personal, or local and personal, or in any act or acts of a local or personal nature, whereby it is enacted or provided that either double or treble costs, or any other than the usual costs between party and party, shall or may be recovered, shall be and the same are hereby repealed: Provided always, that in lieu thereof the usual costs between party and party shall and may be recovered, and no more.

Repeal of provision in local and personal acts giving double and treble costs.

2. And be it enacted, that so much of any clause, enactment, or provision in any public act or acts, not local or

Repealing provision in

* This useful Act is commonly known as "Sir Frederick Pollock's Act."

public acts giving double and treble costs.

personal, whereby it is enacted or provided that either double or treble costs, or any other than the usual costs between party and party, shall or may be recovered, shall be and the same are hereby repealed: Provided always, that instead of such costs the party or parties heretofore entitled under such last-mentioned acts to such double, treble, or other costs shall receive such full and reasonable indemnity as to all costs, charges, and expenses incurred in and about any action, suit, or other legal proceeding, and shall be taxed by the proper officer in that behalf, subject to be reviewed in like manner and by the same authority as any other taxation of costs by such officer.

Repeal of provision in local and personal acts allowing general issue.

3. And be it enacted, that so much of any clause or provision in any act or acts commonly called public local and personal, or local and personal, or in any act or acts of a local and personal nature, whereby any party or parties are entitled or permitted to plead the general issue only and to give any special matter in evidence without specially pleading the same, shall be and the same is hereby repealed.

The 11 Geo. 1, c. 301, s. 43, authorizing the Royal Exchange and London Assurance Corporations to plead, in answer to actions of covenant, "that they have not broken the covenants in such policy contained, or any of them," is not an act of a local and personal nature within the meaning of this act, and the authority given to those corporations to plead the plea in question is therefore unrepealed (*Carr* v. *The Royal Exchange Assurance Corporation*, 1 B. & S. 956; L. J. 31, Q. B. 98).

Uniformity of notice of action.

4. And whereas it is expedient that the law should be uniform with respect to notice of action in all cases where such notice of action is required: Be it therefore enacted, that from and after the passing of this act, in all cases where notice of action is required, such notice shall be given one calendar month at least before any action shall be commenced; and such notice of action shall be sufficient, any act or acts to the contrary thereof notwithstanding.

The legislature did not intend by this section to prevent all future acts from containing provisions regulating notice of action (*Boden* v. *Smith*, L. J. 18, C. P. 121).

As to how a calendar month is to be reckoned, see *Freeman* v. *Read* (4 B. & S. 174; L. J. 32, M. C. 226).

General limitation of actions under local and personal acts.

5. And whereas divers acts commonly called public local and personal, or local and personal acts, and divers other acts of a local and personal nature, contain clauses limiting the time within which actions may be brought for anything done in pursuance of the said acts respectively: And whereas the periods of such limitations vary very much, and it is expedient that there should be one period of limitation only: Be it therefore enacted, that from and after the passing of this act the period within which any action may be brought for anything done under the authority or in

pursuance of any such act or acts shall be two years, or in case of continuing damage then within one year after such damage shall have ceased; and that so much of any clause, provision, or enactment by which any other time or period of limitation is appointed or enacted shall be and the same is hereby repealed.

As to what acts have been held to be local and personal within this section, see Chitty's statutes, 3rd edit., vol. iii., p. 66.

As to how far this act is prospective, see *Boden* v. *Smith* (*ubi supra*), decided under section 4.

Act not to extend to actions, &c. brought before passing of this act.

6. Provided always, and be it enacted, that nothing herein contained shall extend or be construed to extend to any action, bill, plaint, or information, or any legal proceeding of any kind whatsoever, commenced before the passing of this act, but such proceedings may be thereupon had and taken in all respects as if this act had not passed.

[6 & 7 Vict. c. 82.]

An Act for extending to Scotland and Ireland the Power of the Lord High Chancellor to grant Commissions to enable Persons to take and receive Affidavits; and for amending the Law relating to Commissions for the Examination of Witnesses. [22nd August, 1843.]

WHEREAS it would be convenient to extend to Scotland and Ireland the power of the Lord High Chancellor of Great Britain to grant commissions in order to enable persons to take affidavits, affirmations, and declarations: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that the Lord Chancellor, Lord Keeper or Lords Commissioners of the Great Seal, for the time being, shall have such and the same powers for granting commissions for the purpose of enabling fit and proper persons to take and receive affidavits, affirmations, and declarations in Scotland and Ireland, and to perform the other duties of masters extraordinary of the High Court of Chancery in England, as he and they now have in any part of the kingdom of England.

Lord Chancellor to have the same powers for granting commissions for taking affidavits, &c. in Scotland and Ireland as he now has in England.

2. And be it enacted, that all and every persons and person wilfully swearing or affirming or declaring falsely in any affidavit or affirmation or declaration to be made in that part of the United Kingdom called Scotland, before any person or persons who shall be empowered to take affidavits or affirmations or declarations in Scotland under the authority aforesaid, shall be deemed guilty of perjury, and shall be liable to prosecution and punishment for perjury in the same manner and to the same effect as if such persons or person had wilfully sworn falsely as a witness or witnesses in open court in any judicial proceeding in Scotland, or in any court of competent jurisdiction in that part of the United Kingdom in which such person shall be apprehended on such a charge; and it shall be competent to bring such prosecution, if brought in Scotland, either in the Court of Justiciary or in the Sheriff Court of the county within which the offence shall have been committed.

Persons wilfully swearing falsely in any affidavit, &c. in Scotland deemed guilty of perjury, and liable to punishment in same manner as persons swearing falsely in open court.

3. And be it enacted, that all and every persons and person wilfully swearing or affirming falsely in any affidavit or affirmation to be made before any person or persons who shall be empowered to take affidavits or affirmations in Ireland under the authority aforesaid shall be deemed guilty of perjury, and shall incur and be liable to the same pains and

Persons wilfully swearing falsely in any affidavit or affirmation in Ireland deemed guilty of

penalties as if such person or persons had wilfully sworn or affirmed falsely in the open court in which such affidavit or affirmation shall be intituled, or in the court in which such person or persons shall be tried, and be liable to be prosecuted for such perjury in any court of competent jurisdiction in Ireland, or in that part of the United Kingdom in which such person shall be apprehended on such a charge; and if any declaration which shall be made before any person who shall be empowered to take declarations in Ireland under the authority aforesaid shall be false or untrue in any material particular, the person wilfully making such false declaration shall be deemed guilty of a misdemeanor, and shall be punishable accordingly.

perjury, and liable to same pains and penalties as for swearing falsely in open court.

False declaration, a misdemeanor.

4. And be it enacted, that every such person authorized to act under any such commission as aforesaid shall be entitled to receive and take such and the same fees, and none other, as masters extraordinary of the High Court of Chancery in England are now entitled to by virtue of the orders of that court, or of any act or acts of parliament now in force.

What fees may be taken.

5. And whereas there are at present no means of compelling the attendance of persons to be examined under any commission for the examination of witnesses issued by the courts of law or equity in England or Ireland, or by the courts of law in Scotland, to be executed in a part of the realm subject to different laws from that in which such commissions are issued, and great inconvenience may arise by reason thereof; Be it therefore enacted, that if any person, after being served with a written notice to attend any commissioner or commissioners appointed to execute any such commission for the examination of witnesses as aforesaid (such notice being signed by the commissioner or commissioners, and specifying the time and place of attendance), shall refuse or fail to appear and be examined under such commission, such refusal or failure to appear shall be certified by such commissioner or commissioners, and it shall thereupon be competent, to or on behalf of any party suing out such commission, to apply to any of the superior courts of law in that part of the kingdom within which such commission is to be executed, or any one of the judges of such courts, for a rule or order to compel the person or persons so refusing or failing as aforesaid to appear before such commissioner or commissioners and to be examined under such commission; and it shall be lawful for the court or judge to whom such application shall be made by rule or order to command the attendance and examination of any person to be named, or the production of any writings or documents to be mentioned in such rule or order.

For compelling the attendance of witnesses.

6. And be it enacted, that upon the service of such rule or order upon the person named therein, if he or she shall not appear before such commissioner or commissioners as afore-

Punishment of persons disobeying rule or

order to appear or to produce writings or documents required.

said for examination, or to produce the writings or documents mentioned in such rule or order, the disobedience to such rule or order shall, if the same shall happen in England or in Ireland, render the person disobeying subject and liable to such pains and penalties as he or she would be subject and liable to by reason of disobedience to a writ of subpœna in England or in Ireland; and if such disobedience shall happen in Scotland it shall be competent to the Lord Ordinary on the bills, upon an application made to him by or on behalf of any party suing out such commission, and upon proof of such disobedience made before him, to direct the issue of letters of second diligence, according to the forms of the law of Scotland, to be used against the person disobeying such rule or order.

For payment of witnesses, &c.

7. Provided always, and be it enacted, that every person whose attendance shall be so required shall be entitled to the like conduct-money and payment of expenses and for loss of time as for and upon attendance at any trial in a court of law; and that no person shall be compelled to produce under such rule or order any writing or other document that he or she would not be compellable to produce at a trial, nor to attend on more than two consecutive days, to be named in such rule or order.

[17 & 18 VICT. c. 34.]

An Act to enable the Courts of Law in England, Ireland and Scotland to issue Process to compel the Attendance of Witnesses out of their Jurisdiction, and to give effect to the Service of such Process in any part of the United Kingdom.

[10th July, 1854.]

WHEREAS great inconvenience arises in the administration of justice from the want of a power in the Superior Courts of Law to compel the attendance of witnesses resident in one part of the United Kingdom at a trial in another part, and the examination of such witnesses by commission is not in all cases a sufficient remedy for such inconvenience: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

Courts of Law in England, Ireland and Scotland may issue process to compel the attendance of witnesses although not within their jurisdiction.

1. If, in any action or suit now or at any time hereafter depending in any of her Majesty's Superior Courts of Common Law at Westminster or Dublin, or the Court of Session or Exchequer in Scotland, it shall appear to the court in which such action is pending, or, if such court is not sitting, to any judge of any of the said courts respectively, that it is proper to compel the personal attendance at any trial of any witness who may not be within the jurisdiction of the court in which such action is pending, it shall be lawful for such court or judge, if in his or their discretion it shall so seem fit, to order that a writ, called a writ of subpœna ad testificandum, or of subpœna duces tecum, or warrant of citation, shall issue in special form, commanding such witness to attend such trial wherever he shall be within the United Kingdom, and the service of any such writ or process in any part of the United Kingdom shall be as valid and effectual to all intents and purposes as if same had been served within the jurisdiction of the court from which it issues.

It will be seen from the terms of this section that if the court be sitting, the application must be made to the court and not to a judge at chambers. The application should be made on an affidavit showing that the witness is a material and necessary witness, and also what he is required to prove (*Allen* v. *Duke of Hamilton*, L. R. 2, C. P. 630).

The rule for the writ to issue is absolute in the first instance (*Harris* v. *Barker*, L. J. 25, Q. B. 98, Bail Court; *Readman* v. *Broers*, 1 Jur. N. S. 1052, Ex. M. T. 1855).

See as to enforcing the attendance of witnesses before commissioners under commissions issued out of her Majesty's courts in other parts of her dominions, 6 & 7 Vict. c. 82,

ss. 5, 6 and 7 (*ante*, pp. 485, 486); *Reg.* v. *Alexander*, 8 Jur. 380, E. T. 1844, Bail Court, *cor.* Coleridge, J.; *Reg.* v. *Jennell*, 2 D. & L. 21.

Statement to be made at foot of writ that it is issued by special order.

2. Every such writ shall have at foot thereof a statement or notice that the same is issued by the special order of the court or judge, as the case may be; and no such writ shall issue without such special order.

Witnesses making default are to be punished by the courts of the country in which the process was served.

3. In case any person so served shall not appear according to the exigency of such writ or process, it shall be lawful for the court out of which the same issued, upon proof made of the service thereof, and of such default, to the satisfaction of the said court, to transmit a certificate of such default under the seal of the same court, or under the hand of one of the judges or justices of the same, to any of Her Majesty's Superior Courts of Common Law at Westminster, in case such service was had in England, or in case such service was had in Scotland to the Court of Session or Exchequer at Edinburgh, or in case such service was had in Ireland to any of Her Majesty's Superior Courts of Common Law at Dublin; and the court to which such certificate is so sent shall and may thereupon proceed against and punish the person so having made default in like manner as they might have done if such person had neglected or refused to appear in obedience to a writ of subpœna or other process issued out of such last-mentioned court.

Persons not to be punished if it shall appear that sufficient money has not been tendered to pay expenses.

4. None of the said courts shall in any case proceed against or punish any person for having made default by not appearing to give evidence in obedience to any writ of subpœna or other process issued under the powers given by this act, unless it shall be made to appear to such court that a reasonable and sufficient sum of money to defray the expenses of coming and attending to give evidence, and of returning from giving such evidence, had been tendered to such person at the time when such writ of subpœna or process was served upon such person.

Act not to prevent the issuing of a commission to examine witnesses.

5. Nothing herein contained shall alter or affect the power of any of such courts to issue a commission for the examination of witnesses out of their jurisdiction, in any case in which, notwithstanding this act, they shall think fit to issue such commission.

Not to affect the admissibility of evidence where now receivable.

6. Nothing herein contained shall alter or affect the admissibility of any evidence at any trial where such evidence is now by law receivable, on the ground of any witness being beyond the jurisdiction of the court, but the admissibility of all such evidence shall be determined as if this act had not passed.

[23 & 24 VICT. c. 34.]

An Act to amend the Law relating to Petitions of Right, to simplify the Proceedings, and to make Provisions for the Costs thereof.

[3rd July, 1860.]

WHEREAS it is expedient to amend the law relating to petitions of right, to simplify the procedure therein, to make provision for the recovery of costs in such cases, and to assimilate the proceedings, as nearly as may be, to the course of practice and procedure now in force in actions and suits between subject and subject: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:—

Petitions of right may be intituled in any of the superior courts at Westminster.

1. A petition of right may, if the suppliant think fit, be intituled in any one of the superior courts of common law or equity at Westminster in which the subject-matter of such petition or any material part thereof would have been cognizable* if the same had been a matter in dispute between subject and subject,† and if intituled in a court of common law shall state in the margin the venue for the trial of such petition; and such petition shall be addressed to Her Majesty in the form or to the effect in the schedule to this act annexed (No. 1), and shall state the christian and surname and usual place of abode of the suppliant and of his attorney, if any, by whom the same shall be presented, and shall set forth with convenient certainty the facts entitling the suppliant to relief, and shall be signed by such suppliant, his counsel or attorney.

The form, nature, and contents of the petition as in schedule No. 1.

The object of this act is to simplify the procedure in petitions of right, but it does not give subjects any cause of petition or remedy against the crown which they did not possess before this act, see sect. 7 (*Tobin* v. *The Queen*, 16 C. B. N. S. 310; L. J. 33, C. P. 199). Thus a petition of right cannot be maintained to recover unliquidated damages for a trespass, nor to recover compensation for a wrongful act done by a servant of the crown in the sup-

* The Court of Chancery has no jurisdiction to entertain a petition of right to adjudicate upon a claim to lands belonging to the Crown, situate in a colony (*Re Holmes*, 2 Johns. & H. 527; S. C. sub nom. *Holmes* v. *Reg.*, L. J. 31, Ch. 38).

† A petition of right must be limited to such matters as are cognizable in a court of law or equity between subject and subject: see *Irwin* v. *Sir George Grey*, per Erle, C. J. (3 F. & F. 635; 1 New Reports, 237).

posed performance of his duties (*Id.*); nor for the infringement of a patent (*Feather* v. *The Queen*, 6 B. & S. 257; L. J. 35, Q. B. 200); see also *Churchward* v. *The Queen* (L. R. 1, Q. B. 173).

Petition to be left with the Secretary of State for the Home Department for Her Majesty's fiat.

2. The said petition shall be left with the Secretary of State for the Home Department, in order that the same may be submitted to Her Majesty for Her Majesty's gracious consideration,* and in order that Her Majesty, if she shall think fit, may grant her fiat that right be done, and no fee or sum of money shall be payable by the suppliant on so leaving such petition, or upon his receiving back the same.

Upon fiat being obtained, petition, &c., to be left at office of solicitor of the Treasury endorsed as in schedule No. 2.

3. Upon Her Majesty's fiat being obtained to such petition, a copy of such petition and fiat shall be left at the office of the solicitor to the Treasury, with an endorsement thereon in the form or to the effect in the schedule (No. 2) to this act annexed, praying for a plea or answer on behalf of Her Majesty within twenty-eight days, and it shall thereupon be the duty of the said solicitor to transmit such petition to the particular department to which the subject-matter of such petition may relate, and the same shall be prosecuted in the court in which the same shall be intituled, or in such other court as the Lord Chancellor may direct.

Time for answering by the Crown.

4. The time for answering, pleading, or demurring to such petition, on behalf of Her Majesty, shall be the said period of twenty-eight days after the same, with such prayer of a plea or answer as aforesaid, shall have been left at the office of the solicitor to the Treasury, or such further time as shall be allowed by the court or a judge: Provided always, that it shall be lawful for the Lord Chancellor, on the application of the Attorney-General or of the suppliant, to change the court in which such petition shall be prosecuted, or the venue for the trial of the same.

Power to change the court or venue.

Time for answering by other persons, parties to the petition.

5. In case any such petition of right shall be presented for the recovery of any real or personal property, or any right in or to the same, which shall have been granted away or disposed of by or on behalf of Her Majesty or her predecessors, a copy of such petition, allowance, and fiat shall be served upon or left at the last or usual or last known place of abode of the person in the possession, occupation, or enjoyment of such property or right, endorsed with a notice in the form set forth in the schedule (No. 3), requiring such person to appear thereto within eight days, and to plead or answer thereto in the court in which the same shall be prosecuted within fourteen days after the same shall have been so served or left as aforesaid; and it shall not be necessary to issue any scire facias or other process to such person for the pur-

* There would seem to be a legal duty imposed upon the Secretary of State to submit the petition to Her Majesty; but it would also seem to be his duty to advise Her Majesty whether she should grant or withhold her fiat thereto, and he cannot be required to state what advice he has so given to Her Majesty (*Irwin* v. *Sir George Grey*, 3 F. & F. 635; 1 New Reports, 237).

pose of requiring him to appear and plead or answer to such petition, but he shall within the time so limited, if it be intended by him to contest such petition, enter an appearance to the same in the form set forth in schedule (No. 4) to this act annexed, or to the like effect, and shall plead, answer, or demur to the said petition within the time specified in such notice, or such further time as shall be allowed by the court or a judge.

The answer or plea to such petition.

6. Such petition may be answered by way of answer, plea, or demurrer in a court of equity, or in a court of common law by way of plea or demurrer, or by both pleas and demurrer, by or in the name of Her Majesty's Attorney-General on behalf of Her Majesty, and by or on behalf of any other person who may in pursuance hereof be called upon to plead or answer thereto, in the same manner as if such petition in a court of equity were a bill filed therein, or if the petition be prosecuted in a court of common law as if the same were a declaration in a personal action, and without the necessity for any inquisition finding the truth of such petition or the right of the suppliant, and such and the same matter as would be sufficient ground of answer or defence in point of law or fact to such petition on the behalf of Her Majesty may be alleged on behalf of any such other person as aforesaid called on to plead or answer thereto.

The practice and course of procedure in action and suit between subject and subject shall extend to petitions of right, so far as applicable.

7. So far as the same may be applicable, and except in so far as may be inconsistent with this act, the laws and statutes in force as to pleading, evidence, hearing, and trial, security for costs, amendment, arbitration, special cases, the means of procuring and taking evidence, set-off, appeal, and proceedings in error in suits in equity, and personal actions between subject and subject, and the practice and course of procedure of the said courts of law and equity respectively for the time being in reference to such suits and personal actions, shall, unless the court in which the petition is prosecuted shall otherwise order, be applicable and apply and extend to such petition of right: Provided always, that nothing in this statute shall be construed to give to the subject any remedy against the crown in any case in which he would not have been entitled to such remedy before the passing of this act.

This act does not affect the prerogative of the crown to plead double or plead and demur without the leave of the court (*Tobin* v. *The Queen*, 14 C. B. N. S. 505; L. J. 32, C. P. 216). In which case a general traverse of all the allegations in the petition was pleaded together with a demurrer.

As to where a petition of right will lie against the crown, see *Tobin* v. *The Queen* (16 C. B. N. S. 310); and note to s. 1 (*ante*, p. 489).

Decrees or judgments by default.

8. In case of a failure on the behalf of Her Majesty, or of any such other person as aforesaid called upon to answer or plead to such petition, to plead, answer, or demur

in due time, either to such petition or at any subsequent stage of the proceedings thereon, the suppliant shall be at liberty to apply to the court or a judge for an order that the petition may be taken as confessed; and it shall be lawful for such court or judge, on being satisfied that there has been such failure to plead, answer, or demur in due time, to order that such petition may be taken as confessed as against Her Majesty or such other party so making default; and in case of default on the behalf of Her Majesty and any other such person (if any) called upon as aforesaid to answer or plead thereto, a decree may be made by the court, or leave may be given by the court, on the application of the suppliant, to sign judgment in favour of the suppliant: Provided always, that such decree or judgment may afterwards be set aside by such court or a judge, in their or his discretion, on such terms as to them or him shall seem fit.

Form of judgment or decree.

9. Upon every such petition of right the decree or judgment of the court, whether given upon demurrer upon the pleadings or upon a default to answer or plead in time, or after hearing or verdict, or in error, shall be that the suppliant is or is not entitled either to the whole or to some portion of the relief sought by his petition, or such other relief, as the court may think right, and such court may give a decree or judgment that the suppliant is entitled to such relief, and upon such terms and conditions (if any) as such court shall think just.

Effect of judgment of amoveas manus.

10. In all cases in which the judgment commonly called a judgment of amoveas manus has heretofore been pronounced or given upon a petition of right, a judgment that the suppliant is entitled to relief as hereinbefore provided shall be of such and the same effect as such judgment of amoveas manus.

Costs recoverable by the Crown and any other person party to the petition.

11. Upon any such petition of right the Attorney-General or other person appearing on behalf of Her Majesty, and every such other person as aforesaid who shall appear and plead or answer to such petition, shall be entitled respectively to recover costs against the suppliant, in the same manner, and subject to the same restrictions and discretion, and under the same rules, regulations, and provisions, so far as they are applicable, as are or may be usually adopted or in force touching the payment or receipt of costs in proceedings between subject and subject, and for the recovery of such costs such and the same remedies and writs of execution as are authorized for enforcing payment of costs upon judgments in personal actions or decrees, rules or orders, shall and may be prosecuted, sued out, and executed respectively by or on behalf of Her Majesty and of such other person as aforesaid as shall appear and plead to such petition, and any costs recovered on behalf of Her Majesty shall be paid into the Exchequer, and shall become part of the consolidated fund, except where such petition shall be defended on behalf of Her Majesty in her private capacity, in which

case such costs shall be paid to the treasurer of Her Majesty's household, or such other person as Her Majesty shall appoint to receive the same.

The suppliant to be entitled to costs against the Crown and other parties to the proceedings.

12. Upon any such petition of right the suppliant shall be entitled to costs against Her Majesty, and also against any other person appearing or pleading or answering to any such petition of right, in like manner, and subject to the same rules, regulations, and provisions, restrictions, and discretion, as far as they are applicable, as are or may be usually adopted or in force touching the right to recover costs in proceedings between subject and subject; and for the recovery of any such costs from any such person, other than Her Majesty, appearing or pleading or answering in pursuance hereof, to any such petition of right, such and the same remedies and writs of execution as are authorized for enforcing payment of costs upon rules, orders, decrees, or judgments in personal actions between subject and subject shall and may be prosecuted, sued out, and executed on behalf of such suppliant.

Decree or judgment in favour of the suppliant to be certified to the Treasury or the treasurer of the household in form of schedule No. 5.

13. Whenever, upon any such petition of right, a judgment, order, or decree shall be given or made that the suppliant is entitled to relief, and there shall be no rehearing, appeal, or writ of error, or in case of an appeal or proceedings in error a judgment, order, or decree shall have been affirmed, given, or made that the suppliant is entitled to relief, or upon any rule or order being made entitling the suppliant to costs, any one of the judges of the court in which such petition shall have been prosecuted shall and may, upon application in behalf of the suppliant, after the lapse of fourteen days from the making, giving, or affirming of such judgment or decree, rule, or order, certify to the Commissioners of Her Majesty's Treasury, or to the treasurer of Her Majesty's household, as the case may require, the tenor and purport of the same, in the form in the schedule (No. 5) to this act annexed, or to the like effect; and such certificate may be sent to or left at the office of the Commissioners of Her Majesty's Treasury, or of the treasurer of Her Majesty's household, as the case may be.

Satisfaction of the judgment and costs.

14. It shall be lawful for the Commissioners of Her Majesty's Treasury, and they are hereby required, to pay the amount of any monies and costs as to which a judgment or decree, rule, or order shall be given or made that the suppliant in any such petition of right is entitled, and of which judgment or decree, rule, or order the tenor and purport shall have been so certified to them as aforesaid, out of any monies in their hands for the time being legally applicable thereto, or which may be hereafter voted by Parliament for that purpose, provided such petition shall relate to any public matter; and in case the same shall relate to any private property of or enjoyed by Her Majesty, or any contract or engagement made by or on behalf of Her Majesty, or any matter affecting Her Majesty in her private capacity,

a certificate in the form aforesaid may be sent to or left at the office of the treasurer of Her Majesty's household, or such other person as Her Majesty shall from time to time appoint to receive the same, and the amount to which the suppliant is entitled shall be paid to him out of such funds or monies as Her Majesty shall be graciously pleased to direct to be applied for that purpose.

Power to judges to make rules and regulations, &c.

15. It shall be lawful for the judges of the said courts of law and equity respectively, or any three or more of the judges of the Court of Chancery, of whom the Lord Chancellor shall be one, and for any eight or more of the judges of the courts of common law, of whom the chiefs of each of the said courts shall be three, from time to time to make all such general rules and orders in their said respective courts of law and equity, for regulating the pleading and practice on such petitions of right, and for the effectual execution of this act and of the intention and object hereof, and for fixing the costs to be allowed for and in respect of the several matters herein contained, and the performance thereof, and for the government and conduct of the officers of their respective courts in and relating to the distribution and performance of the duties and business to be done or performed in execution of this act, as such judges may think fit, reasonable, necessary, or proper, and to frame such writs and forms of proceedings as to them may seem expedient for the purposes aforesaid; and all such rules, orders, or regulations shall be laid before both Houses of Parliament, if Parliament be then sitting, immediately upon the making of the same, or if Parliament be not sitting then within five days after the next meeting thereof; and no such rule, order, or regulation shall have effect until three months after the same shall have been so laid before both Houses of Parliament; and any rule, order, or regulation so made shall from and after such time aforesaid be binding and obligatory on the said courts, and on any Courts of Error or Appeal into which any judgments or decrees of the said courts shall be carried by any writ of error or appeal, and be of the like force and effect as if the provisions contained therein had been expressly enacted by Parliament: Provided always, that it shall be lawful for the Queen's most excellent Majesty, by any proclamation inserted in the London Gazette, or for either of the Houses of Parliament, by any resolution passed at any time within three months next after such rules, orders, and regulations shall have been laid before Parliament, to suspend the whole or any part of such rules, orders, or regulations, and in such case the whole, or such part thereof as shall be so suspended, shall not be binding and obligatory on the said courts.

No rules appear yet to have been made under the powers given by this section.

Interpretation of terms.

16. In the construction of this act the words "Her Majesty" shall extend to and include Her Majesty's suc-

cessors; and the words "Lord High Chancellor" and "Lord Chancellor" respectively shall mean and include Keeper of the Great Seal and Commissioners for executing the office of Lord Chancellor or Keeper of the Great Seal; the word "court" shall be understood to mean any one of the superior courts of common law or equity at Westminster in which any such petition is presented; the word "relief" shall comprehend every species of relief claimed or prayed for in any such petition of right, whether a restitution of any incorporeal right, or a return of lands or chattels, or a payment of money or damages, or otherwise; and the word "judge" shall be understood to mean a judge or baron of any of the said courts respectively; and wherever in this act, in describing or referring to any person, party, or thing, any word importing the singular number or masculine or feminine gender is used, the same shall be understood to include and be applicable to several persons and parties as well as one person or party, and to females as well as males, and males as well as females, and bodies corporate as well as individuals, and several matters and things as well as one matter or thing, unless it otherwise be provided, or there be something in the subject or context repugnant to such construction.

Short title.

17. In citing this act in any instrument, document, or proceeding, it shall be sufficient to use the expression "The Petitions of Right Act, 1860."

Nothing to prevent suppliant proceeding as before.

18. Nothing in this act contained shall prevent any suppliant from proceeding as before the passing of this act.

SCHEDULE REFERRED TO IN THE FOREGOING ACT.

No. 1.

Petition.

In the Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas, *or* in Chancery].

To the Queen's most excellent Majesty.

[*Middlesex*] } The humble petition of *A. B.* of , by
to wit. } his attorney, *E. F.* of showeth that
[*state the facts*].

Conclusion.

Your suppliant therefore humbly prays, that, *&c.*

Dated the day of A.D.

(Signed) *A. B.*
or C. D., counsel for *A. B.*
or E. F., attorney for *A. B.*

No. 2.

The suppliant prays for a plea or answer on behalf of Her Majesty within twenty-eight days after the date hereof, or otherwise that the petition may be taken as confessed.

No. 3.

To *A. B.*

You are hereby required to appear to the within petition, in Her Majesty's Court of Queen's Bench [Common Pleas, *or* Exchequer, *or* High Court of Chancery], within eight days, and to plead or answer thereto within fourteen after the date hereof.

Take notice, that if you fail to appear or plead or answer in due time the said petition may, as against you, be ordered to be taken as confessed.

Dated, *&c.*

No. 4.

In the Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas, *or* in Chancery].

Petition of Right.

A. B., Suppliant, *v.* The Queen. } *C. D.* appears in person. *E. F.*, attorney for *C. D.*, appears for him.

If the appearance be in person, the address of the party appearing to be given.

Entered the day of 186 .

No. 5.

Certificate of a Judge of the Court of the Tenor and Purport of the Judgment or Decree.

To the Commissioners of Her Majesty's Treasury [*or* the Treasurer of Her Majesty's Household].

Petition of Right of *A. B.* in Her Majesty's Court of Queen's Bench [Common Pleas, *or* Exchequer, *or* High Court of Chancery] at Westminster.

I humbly certify, that on the day of A.D. it was, by the said Court of Queen's Bench [Common Pleas, *or* Exchequer, *or* High Court of Chancery] adjudged [*or* decreed, *or* ordered] that the above-named suppliant was entitled to, *&c.*

Judge's Signature.

[23 & 24 Vict. c. 38.]

*An Act to further amend the Law of Property.**

[23rd July, 1860.]

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

Writs of execution of judgments to be registered.

1. Whereas it is desirable to place freehold, copyhold, and customary estates on the same footing with leasehold estates, in respect of judgments, statutes, and recognizances as against purchasers and mortgagees, and also to enable purchasers and mortgagees of estates, whether freehold, copyhold, or customary or leasehold, to ascertain when execution has issued on any judgment, statute, or recognizance, and to protect them against delay in the execution of the writ: Be it therefore enacted, that no judgment, statute, or recognizance to be entered up after the passing of this act shall affect any land (of whatever tenure) as to a *bonâ fide* purchaser for valuable consideration, or a mortgagee, (whether such purchaser or mortgagee have notice or not of any such judgment, statute, or recognizance,) unless a writ or other due process of execution of such judgment, statute, or recognizance shall have been issued and registered as hereinafter is mentioned before the execution of the conveyance or mortgage to him, and the payment of the purchase or mortgage money by him: Provided always, that no judgment, statute, or recognizance to be entered up after the passing of this act, nor any writ of execution or other process thereon, shall affect any land of whatever tenure as to a *bonâ fide* purchaser or mortgagee, although execution or other process shall have issued thereon, and have been duly registered, unless such execution or other process shall be executed and put in force within three calendar months from the time when it was registered.

It is now provided by stat. 27 & 28 Vict. c. 112, s. 1, (*post*, p. 505), that no judgment "shall affect land until the land shall have been actually delivered in execution by virtue of a writ of elegit" or otherwise. Hence it appears now to be useless to register, under this and the next sections, a writ of execution issued on a judgment entered up after 29th July, 1864 (the date of the above act), before the land has been actually delivered in execution, except, perhaps, where the debtor has an interest in the land which the sheriff cannot deliver in execution, *e. g.*, an equity of redemption, and in which case the judgment creditor is obliged

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* Those sections only of this Act that relate to common law procedure or practice are here given in full.
The Act is known as one of "Lord St. Leonards' Acts."

to proceed in equity in order to enforce his charge on the land. See stat. 27 & 28 Vict. c. 112, ss. 1, 5, note (*post*, pp. 505, 507).

Mode of registering.

2. The registry hereinbefore required of any writ of execution or other due process on any judgment, statute, or recognizance, in order to bind a purchaser or mortgagee, shall be made by a memorandum or minute referring to the judgment, statute, or recognizance already registered, so as to connect the registry of the writ of execution or other process therewith; such memorandum or minute to be left with the Senior Master of the Court of Common Pleas at Westminster, who shall forthwith enter the particulars in a book in alphabetical order by the name of the person in whose behalf the judgment, statute, or recognizance upon which the writ of execution or other process issued was registered, and also the year and the day of the month when every such memorandum or minute is left with him, and such officer shall be entitled for any such registry to the sum of five shillings; and all persons shall be at liberty to search the same book, in addition to all the other books in the same office, on payment of the sum of one shilling only: and all the provisions in this act in regard to writs of execution or other process and the registry thereof, or otherwise relating thereto, shall extend, mutatis mutandis, to writs of execution or other due process issuing on judgments of the several courts of common pleas of the county palatine of Lancaster, and of pleas of the county palatine of Durham: but none of these provisions are to extend to Ireland.

By stat. 27 & 28 Vict. c. 112, s. 3 (*post*, p. 506), it is enacted, that writs of execution by virtue of which any land has been actually delivered in execution shall be registered in the manner provided by this section, but in the "name of the debtor" instead of the creditor, and that no other or prior registration of the judgment shall be necessary for any purpose.

Provision for protection of heirs and executors against unregistered judgments.

2. And whereas by an act passed in the fourth and fifth years of their late Majesties King William and Queen Mary, intituled "An Act for the better Discovery of Judgments in the Courts of King's Bench, Common Pleas, and Exchequer in Westminster," it was enacted, that no judgment not docketed and entered in books in the manner thereby provided should affect any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators in their administration of their ancestors, testators, or intestates' estates: And whereas by several later acts judgments are required to be registered with more particulars than were required by the said recited act; and it is thereby enacted that judgments not so registered shall not affect any lands, tenements, or hereditaments as to purchasers, mortgagees, or creditors, unless and until the same shall be registered in manner thereby required; and in obedience to a direction in one of the same acts con-

tained the dockets existing under the said first-recited act have been finally closed: And whereas the said several later acts do not expressly enact that judgments not docketed as thereby required shall not have any preference against heirs, executors, or administrators in their administration of their ancestors, testators, or intestates' estates, in consequence whereof such heirs, executors, or administrators have been held to have lost the protection which they enjoyed under the said first-recited act, and it is expedient that the same should be restored: Be it therefore declared and enacted, that no judgment which has not already been or which shall not hereafter be entered or docketed under the several acts now in force, and which passed subsequently to the said act of the fourth and fifth years of King William and Queen Mary, so as to bind lands, tenements, or hereditaments as against purchasers, mortgagees, or creditors, shall have any preference against heirs, executors, or administrators in their administration of their ancestors, testators, or intestates' estates.

Before the passing of this section, if an administrator paid simple contract debts, he was not allowed them against judgment creditors, though the judgments were unregistered when the payment was made, and though he had neither notice nor knowledge of their existence (*Fuller* v. *Redman*, 26 Beav. 600; L. J. 29, Ch. 324).

A judgment signed in 1854 but not registered till after the death of the debtor, which was subsequent to this act, was held not to be entitled to priority in administration (*Kemp* v. *Waddingham*, L. R. 1, Q. B. 355; *Re Turner*, L. J. 33, Ch. 232).

Judgments as against heirs and executors to be re-registered.

4. No judgments which since the passing of an act of the first and second years of Her Majesty Queen Victoria, intituled "An Act for abolishing Arrest on Mesne Process in Civil Actions except in certain cases, for extending the Remedies of Creditors against the Property of Debtors, and for amending the Laws for the Relief of Insolvent Debtors in England," (being one of the Acts hereinbefore referred to,) have been registered under the provisions therein contained, or contained in the later act of the second and third years of Queen Victoria, chapter eleven, as explained and amended by the act of the session of the eighteenth and nineteenth years of Queen Victoria, chapter fifteen, (being two other of the acts hereinbefore referred to,) or which shall hereafter be so registered, shall have any preference against heirs, executors, or administrators in their administration of their executors',* testators', or intestates' estates, unless at the death of the testator or intestate five years shall not have elapsed from the date of the entry thereof on the docket or from the only or last re-registry thereof, as the case may be,

* "Executors" is a misprint for "ancestors," *per* Kindersley, V.-C., in *Evans* v. *Williams*, (2 Drew. & S. 324; L. J. 34, Ch. 661.)

which re-registry from time to time is hereby authorized to be made in manner directed by the said act of the second and third of Queen Victoria, as explained and amended by the act of the eighteenth and nineteenth of Queen Victoria; but it shall be deemed sufficient to secure such preference as aforesaid, if such a memorandum as was required in the first instance is again left with the Senior Master of the Common Pleas within five years before the death of the testator or intestate, although more than five years shall have expired by effluxion of time since the last previous registration, before such last-mentioned memorandum or minute was left; and so *toties quoties* upon every re-registry.

This section has been held not to be retrospective, and therefore the priority of a judgment registered in 1840 against a debtor who died in 1846 was held not to be lost by reason of non-registration within five years of the debtor's death (*Evans* v. *Williams*, 2 Drew. & S. 324; L. J. 34, Ch. 661).

Extent of the word "judgment."

5. In the construction of the previous provisions the term judgment shall be taken to include registered decrees, orders of courts of equity and bankruptcy, and other orders having the operation of a judgment.

6. (This section restricts the effect of waiver of a covenant or condition in a lease).

7. (This section provides for cases of future and contingent uses).

8. (This section extends stat. 22 & 23 Vict. c. 35, s. 24, to mortgagees).

9. (This section directs the form of applying for the advice of a judge under stat. 22 & 23 Vict. c. 35, s. 30).

10. (This section empowers the Lord Chancellors, &c., of England and Ireland to make general orders as to the investment of cash, under the control of the court).

See *In re Birmingham Blue Coat School* (L. R. 1, Eq. 632).

11. (This section enables trustees to invest trust funds in the stocks, &c., in which cash, under the control of the court, may be invested).

12. (This section enacts, that stat. 22 & 23 Vict. c. 35, s. 32, shall act retrospectively).

The provision here recited is explained and extended by stat. 30 & 31 Vict. c. 132.

Extension of sect. 40 of 3 & 4 W. 4, c. 27, to cases of claims to estates of intestates.

13. Whereas by the act of parliament of the third and fourth of William the Fourth, chapter twenty-seven, section forty, it was enacted that after the thirty-first day of December, one thousand eight hundred and thirty-three, no action or suit or other proceeding should be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise, charged upon or payable out of any land or

rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same should have accrued to some person capable of giving a discharge for or release of the same, unless such acknowledgment in writing or payment of principal or interest as therein mentioned should have been given or made, and then within twenty years next after such payment or acknowledgment, or the last of such payments or acknowledgments; And whereas it is expedient that the said enactment should be extended to the case of claims to the estates of persons dying intestate: Be it therefore enacted, that after the thirty-first day of December, one thousand eight hundred and sixty, no suit or other proceeding shall be brought to recover the personal estate, or any share of the personal estate, of any person dying intestate, possessed by the legal personal representative of such intestate, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of such estate or share, or some interest in respect thereof, shall have been accounted for or paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person accountable for the same, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit shall be brought, but within twenty years after such accounting, payment, or acknowledgment, or the last of such accountings, payments, or acknowledgments, if more than one was made or given.

See on this section Chitty's Stat. 3rd ed. vol. iii. pp. 53—58.

14. (This section enacts, that the order to take an account of the debts, &c. of a deceased person, under stat. 13 & 14 Vict. c. 35, s. 19, may be made immediately after probate granted).

15. This act is not to extend to Scotland, nor are any of the clauses, except clause six and the subsequent clauses, to extend to Ireland. Act not to extend to Scotland.

[24 VICT. C. 11.]

An Act to afford Facilities for the better Ascertainment of the Law of Foreign Countries when pleaded in Courts within Her Majesty's Dominions. [17th May, 1861.]

22 & 23 Vict. c. 63.

WHEREAS an act was passed in the twenty-second and twenty-third years of Her Majesty's reign, intituled "An Act to afford Facilities for the more certain Ascertainment of the Law administered in one Part of Her Majesty's Dominions when pleaded in the Courts of another Part thereof:" And whereas it is expedient to afford the like facilities for the better ascertainment, in similar circumstances, of the law of any foreign country or state with the government of which Her Majesty may be pleased to enter into a convention for the purpose of mutually ascertaining the law of such foreign country or state when pleaded in actions depending in any courts within Her Majesty's dominions and the law as administered in any part of Her Majesty's dominions when pleaded in actions depending in the courts of such foreign country or state: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows; viz.,

Superior courts within Her Majesty's dominions may remit a case with queries, to a court of any foreign state with which Her Majesty may have made a convention for that purpose, for ascertainment of law of such state.

1. If, in any action depending in any of the Superior Courts within Her Majesty's dominions it shall be the opinion of such court that it is necessary or expedient, for the disposal of such action, to ascertain the law applicable to the facts of the case as administered in any foreign state or country with the government of which Her Majesty shall have entered into such convention as aforesaid, it shall be competent to the court in which such action may depend to direct a case to be prepared setting forth the facts as these may be ascertained by verdict of jury or other mode competent, or as may be agreed upon by the parties, or settled by such person or persons as may have been appointed by the court for that purpose in the event of the parties not agreeing; and upon such case being approved of by such court or a judge thereof, such court or judge shall settle the questions of law arising out of the same on which they desire to have the opinion of another court, and shall pronounce an order remitting the same, together with the case, to such Superior Court in such foreign state or country as shall be agreed upon in said convention, whose opinion is desired upon the law administered by such foreign court as applicable to the facts set forth in such case, and requesting them to pronounce their opinion on the questions submitted to them; and upon such opinion being pronounced, a copy thereof,

certified by an officer of such court, shall be deemed and held to contain a correct record of such opinion.

Court in which action depends to apply such opinion to the facts set forth in cases, &c.

2. It shall be competent to any of the parties to the action, after having obtained such certified copy of such opinion, to lodge the same with the officer of the court within Her Majesty's dominions in which the action may be depending who may have the official charge thereof, together with a notice of motion setting forth that the party will, on a certain day named in such notice, move the court to apply the opinion contained in such certified copy thereof to the facts set forth in the case hereinbefore specified, and the said court shall thereupon, if it shall see fit, apply such opinion to such facts, in the same manner as if the same had been pronounced by such court itself upon a case reserved for opinion of the court, or upon special verdict of a jury; or the said last-mentioned court shall, if it think fit, when the said opinion has been obtained before trial, order such opinion to be submitted to the jury with the other facts of the case as conclusive evidence of the foreign law therein stated, and the said opinion shall be so submitted to the jury: Provided always, that if after having obtained such certified copy the court shall not be satisfied that the facts had been properly understood by the foreign court to which the case was remitted, or shall on any ground whatsoever be doubtful whether the opinion so certified does correctly represent the foreign law as regards the facts to which it is to be applied, it shall be lawful for such court to remit the said case, either with or without alterations or amendments, to the same or to any other such Superior Court in such foreign state as aforesaid, and so from time to time as may be necessary or expedient.

Courts in Her Majesty's dominions may pronounce opinion on case remitted by a foreign court.

3. If in any action depending in any court of a foreign country or state with whose government Her Majesty shall have entered into a convention as above set forth, such court shall deem it expedient to ascertain the law applicable to the facts of the case as administered in any part of Her Majesty's dominions, and if the foreign court in which such action may depend shall remit to the court in Her Majesty's dominions whose opinion is desired a case setting forth the facts and the questions of law arising out of the same on which they desire to have the opinion of a court within Her Majesty's dominions, it shall be competent to any of the parties to the action to present a petition to such last-mentioned court whose opinion is to be obtained, praying such court to hear parties or their counsel, and to pronounce their opinion thereon in terms of this act, or to pronounce their opinion without hearing parties or counsel; and the court to which such petition shall be presented shall consider the same, and, if they think fit, shall appoint an early day for hearing parties or their counsel on such case, and shall pronounce their opinion upon the questions of law as administered by them which are submitted to them by the foreign

court; and in order to their pronouncing such opinion they shall be entitled to take such further procedure thereupon as to them shall seem proper, and upon such opinion being pronounced a copy thereof, certified by an officer of such court, shall be given to each of the parties to the action by whom the same shall be required.

Interpretation of terms.

4. In the construction of this act the word "action" shall include every judicial proceeding instituted in any court, civil, criminal, or ecclesiastical; and the words "Superior Courts" shall include, in England, the Superior Courts of Law at Westminster, the lord chancellor, the lords justices, the master of the rolls, or any vice-chancellor, the judge of the Court of Admiralty, the judge ordinary of the Court for Divorce and Matrimonial Causes, and the judge of the Court of Probate; in Scotland, the High Court of Justiciary, and the Court of Session, acting by either of its divisions; in Ireland, the Superior Courts of Law at Dublin, the master of the rolls, and the judge of the Admiralty Court; and in any other part of Her Majesty's dominions, the Superior Courts of Law or Equity therein; and in a foreign country or state, any Superior Court or Courts which shall be set forth in any such convention between Her Majesty and the government of such foreign country or state.

[27 & 28 Vict. c. 112.]

*An Act to amend the Law relating to future Judgments, Statutes, and Recognizances.**

[29th July, 1864.]

Whereas it is desirable to assimilate the law affecting freehold, copyhold, and leasehold estates to that affecting purely personal estates in respect of future judgments, statutes, and recognizances: Therefore be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

Future judgments, &c. not to affect land until land delivered in execution

1. No judgment, statute, or recognizance to be entered up after the passing of this act shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of elegit or other lawful authority, in pursuance of such judgment, statute, or recognizance.

This section was no doubt, in accordance with the preamble, intended to assimilate the position of real estate with regard to a judgment to that in which personal property is placed by the Mercantile Law Amendment Act, 1856, s. 1 (*ante*, p. 336); but it may be observed that this section

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* This statute does not bind the Crown, as the Crown is not expressly named herein. The priority of future Crown debts as against the lands of the debtor is now regulated by stat. 28 & 29 Vict. c. 104 (The Crown Suits, &c., Act, 1865), which, by section 48, enacts, that "Any judgment, decree, or order obtained after the commencement of this act" (1st of November, 1865), "by or on behalf of the Crown, or any recognizance entered into after the commencement of this act on the proper account of the Crown, or any inquisition finding after the commencement of this act a debt due to the Crown, or any obligation or specialty made after the commencement of this act to the Crown, or any acceptance of office accepted after the commencement of this act from or under the Crown, shall not affect any land (of whatever tenure) as to a *bond fide* purchaser for valuable consideration or a mortgagee (whether such purchaser or mortgagee have or have not notice of the judgment, decree, order, recognizance, inquisition, obligation, specialty, or acceptance of office), unless a writ of extent or of diem clausit extremum, or other writ or process of execution, in pursuance of or in relation to such judgment, decree, order, recognizance, inquisition, obligation, specialty, or acceptance of office, has been issued and registered before the execution of the conveyance or mortgage to such purchaser or mortgagee, and the payment by him of the purchase or mortgage money."

The 49th section provides for the registration of the writ or process, it is as follows:—

"The registration of such writ or process shall be effected as follows: namely, a minute of the name of the person against whom the writ or process is issued, and of the date of the issuing thereof, and of the amount for which it is issued, shall be left with the senior master of the Court of Common Pleas at Westminster, who shall forthwith enter the same particulars in a book by the name in alphabetical order of the person against whom the writ or process is issued; and no other registration of such writ or process, or of the judgment, decree, order, recognizance, inquisition, obligation, specialty, or acceptance of office, in pursuance of or in relation to which it is issued, shall be necessary for any purpose. There shall be paid for every such entry a fee of two shillings and sixpence; and all persons shall be at liberty to search the said book, with the other books in the office, on payment of a fee of one shilling."

affords greater protection to land than that given by the former act to chattels, for there is no proviso in this section corresponding to that in the former act, making notice of the writ having been delivered to the sheriff take the case in any way out of the benefit of the enactment.

Quære. Whether this section applies to an equity of redemption, inasmuch as it is such an interest as cannot be delivered in execution (*Thornton* v. *Finch*, 4 Giff. 505; L. J. 34, Ch. 466; see also 4 Giff. 508, *note*, and remarks thereon in Williams' Real Property, 7th ed., Addendum, facing p. 1).

Interpretation of terms.

2. In the construction of this act the term "judgment" shall be taken to include registered decrees, orders of courts of equity and bankruptcy, and other orders having the operation of a judgment; and the term "land" shall be taken to include all hereditaments, corporeal or incorporeal, or any interest therein; and the term "debtor" shall be taken to include husbands of married women, assignees of bankrupts, committees of lunatics, and the heirs or devisees of deceased persons.

Writs of execution to be registered in manner prescribed by 23 & 24 Vict. c. 38.

3. Every writ or other process of execution of any such judgment, statute, or recognizance, by virtue whereof any land shall have been actually delivered in execution, shall be registered in the manner provided by an act passed in the session of the twenty-third and twenty-fourth years of her present Majesty, intituled "An Act to further amend the Law of Property,"* but in the name of the debtor against whom such writ or process is issued, instead of, as under the said act, in the name of the creditor; and no other or prior registration of such judgment, statute, or recognizance shall be or be deemed necessary for any purpose; and no reference to any such prior registration shall be required to be made in or by the memorandum or minute of such writ or other process of execution which shall be left with the Senior Master of the Court of Common Pleas for the purpose of such registry.

Creditor to whom land delivered in execution entitled to obtain summary order from Court of Chancery for sale.

4. Every creditor to whom any land of his debtor shall have been actually delivered in execution by virtue of any such judgment, statute, or recognizance, and whose writ or other process of execution shall be duly registered, shall be entitled forthwith, or at any time afterwards while the registry of such writ or process shall continue in force, to obtain from the Court of Chancery, upon petition in a summary way, an order for the sale of his debtor's interest in such land, and every such petition may be served upon the debtor only; and thereupon the court shall direct all such inquiries to be made as to the nature and particulars of the debtor's interest in such land, and his title thereto, as shall appear to be necessary or proper; and in making such inquiries, and generally in carrying into effect such order for

* *Ante*, p. 498.

sale, the practice of the said court with respect to sales of real estates of deceased persons for the payment of debts shall be adopted and followed, so far as the same may be found conveniently applicable.

As might have been expected from the title of the act, this section has been held to apply only where the judgment has been entered up after the passing of this act. (*In re Isle of Wight Ferry Company*, L. J. 34, Ch. 194.) As to orders for sale made under this section against railway companies, see *In re Hull and Hornsea Railway Company* (L. R. 2, Eq. 262); *In re Bishops Waltham Railway Company* (L. R. 2, Ch. 382); *Gardiner* v. *London, Chatham and Dover Railway Company* (L. R. 2, Ch. 385).
See note to sect. 5, *infra*.

Where there are other creditors, notice of sale to be served upon them.

5. If it shall appear on making such inquiries that any other debt due on any judgment, statute or recognizance, is a charge on such land, the creditor entitled to the benefit of such charge (whether prior or subsequent to the charge of the petitioner) shall be served with notice of the said order for sale, and shall after such service be bound thereby, and shall be at liberty to attend the proceedings under the same, and to have the benefit thereof; and the proceeds of such sale shall be distributed among the persons who may be found entitled thereto, according to their respective priorities.

It is not easy to see why the words "or subsequent" were inserted in this section, for the act in terms (see title) refers only to future judgments, and these are, by sect. 1 (*ante*, p. 505), to be no charge on the land until it has been actually delivered in execution, and, moreover, the debtor's interest in his lands which have been extended on a former judgment cannot be extended on a subsequent one (*Carter* v. *Hughes*, 2 H. & N. 714; L. J. 27, Ex. 225). In such a case the ordinary method of enforcing the second judgment was to issue the elegit, and then file a bill in chancery to redeem (*Smith* v. *Hunt*, 10 Hare, 30, 48), in the same manner as a writ of fi. fa. or elegit is enforced against an equity of redemption (*Lysten* v. *Holland*, 1 Ves. 431; *Plunkett* v. *Pearson*, 2 Atk. 290); and in a recent case in which a judgment creditor petitioned for the sale, under sect. 4, of his judgment debtor's lands, which had been previously extended by another judgment creditor under an elegit; Wood, V.-C., dismissed the petition, on the ground that the petitioner must first get rid of the prior elegit. (*In re Cowbridge Railway Company*, 3 Weekly Notes, 1868, p. 14, H. T.) See 23 & 24 Vict. c. 38, s. 1, note (*ante*, p. 497).

Parties claiming interest through debtor bound by order for sale.

6. Every person claiming any interest in such land through or under the debtor, by any means subsequent to the delivery of such land in execution as aforesaid, shall be bound by every such order for sale, and by all the proceedings consequent thereon.

Extent of Act.

7. This act shall not extend to Ireland.

TITLES

OF THE

STATUTES AND RULES

REGULATING

THE PRACTICE AND PROCEDURE

IN THE

COURT OF EXCHEQUER, REVENUE SIDE.

[22 & 23 Vict. c. 21.]

An Act to regulate the Office of Queen's Remembrancer, and to amend the Practice and Procedure on the Revenue Side of the Court of Exchequer. [13th August, 1857.]

[28 & 29 Vict. c. 104.]

An Act to amend the Procedure and Practice in Crown Suits in the Court of Exchequer, at Westminster, and for other Purposes. [5th July, 1865.]

Regulæ Generales, 24 Vict. (1860), 6 H. & N. i.

Regulæ Generales, 25 Vict. (1861), 7 H. & N. 505.

Regulæ Generales, Michaelmas Term, 27 Vict. (1863),* 2 H. & C. 429; L. J. 33, Ex. 134.

Rules regulating the collection of fees by stamps, 18 Dec. 1865. *London Gazette*, 28th December, 1865; L. J. 35, Com. Law, 23.

Regulæ Generales, Easter Term, 1866. Rules of Court for regulating the procedure and practice in suits by English Information. L. R. 1, Ex. 389.

Schedule of Fees to be taken by solicitors. Id. 417.

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* These rules having been held invalid (*Att.-Gen.* v. *Sillem*, 2 H. & C. 581; L. J. 33, Ex. 134, in Ex. Ch.; 10 H. L. Cas. 704; L. J. 33, Ex. 299, in H. of Lords), "The Crown Suits, &c., Act, 1865" (28 & 29 Vict. c. 104), by sect. 35, practically gave them the force of law.

STATUTES AND RULES

REGULATING THE

COLLECTION OF FEES IN THE SUPERIOR COURTS OF COMMON LAW.

[15 & 16 VICT. c. 73.]

An Act to make Provision for a permanent Establishment of Officers to perform the Duties at Nisi Prius, in the Superior Courts of Common Law, and for the Payment of such Officers, and of the Judges' Clerks, by Salaries, and to abolish certain Offices in those Courts.

[30th June, 1852.]

AFTER reciting that the officers in the superior courts of common law who perform the duties at Nisi Prius hold their offices and appointments during pleasure, and that such officers and the clerks at the judges' chambers are remunerated by fees received by them from the suitors, and that it is expedient to provide a permanent establishment of such officers, and that they and the said clerks should be paid by salaries, and that the fees now payable by the suitors should be diminished; it is enacted as follows:

By section 1, from and after the 24th day of October after the passing of this act, the offices of marshal and clerk at Nisi Prius in the Court of Queen's Bench, and marshal in the Courts of Common Pleas and Exchequer, are abolished; and all acts, duties, and services heretofore rendered by such marshals and clerk at Nisi Prius respectively shall be done, performed, and rendered by the associates in the Courts of Queen's Bench, Common Pleas and Exchequer.

Records, &c. to be transferred to associates.

By section 2, all the records, books, papers, and documents of and concerning the duties and business of the several offices of the Courts of Queen's Bench, Common Pleas and Exchequer, so abolished, shall be delivered by the several officers of the said courts respectively now having the custody of the same, into the custody and possession of the associates in the Courts of Queen's Bench, Common Pleas and Exchequer respectively, to be by them kept and preserved; and searches may be made, and copies or extracts of and from the said records, books, papers, and documents shall and may be had and taken, at such times and in such

manner as hath been the accustomed practice in the several offices hereby abolished.

By section 3, when any vacancy shall occur in any of the said offices of associate, the Chief Justice, or Chief Baron shall nominate and appoint some fit person to fill such vacant office.

By section 4, the associates may, for the discharge of the duties of their respective offices, have not exceeding two clerks, and such clerks shall hold their offices during pleasure.

By section 5, convenient offices shall be provided for the transaction of the business of the office of associate.

By section 6, if the said associates, or any of them, shall have occasion to be absent from the business of their or his office for a longer period than two months at any one time, the Chief Justice, or Chief Baron, may give leave of absence to such officer, and, if necessary, to appoint a deputy in his place. Every deputy so appointed shall be paid by the principal for whom he shall act.

By section 7, a fixed sum,* to be settled by the said Commissioners of Her Majesty's Treasury, shall be paid by way of salary to each of the judges' marshals on each spring and summer circuit, and *to the marshal of the senior judge*† on the winter circuit, and, on a special commission, for his services thereon.

By section 8, the Chief Justices and Chief Baron may each appoint three clerks, one of whom is to act as crier on the circuit and in London and Middlesex, and the other justices and barons may each appoint two clerks, one of whom is to act as crier on the circuit; and such clerks shall perform all the duties heretofore performed by the judges' clerks, and shall hold their offices during the pleasure of the judges by whom they are appointed, or, if continued by their successors, during the pleasure of such successors.

By section 9, the present officers are re-appointed to hold their offices during good behaviour.

Treasury to cause table of fees to be prepared, and submitted to judges for approval.

10. And whereas it is expedient that a new table or tables of fees proper to be taken in the said superior courts, and their several offices, and at the judges' chambers, and by the clerks of assize acting as associates on the circuits, should be prepared with reference to the various changes and alterations which have been or may be made in the process, practice, and proceedings of those courts, and to the diminution of expense, where practicable, to the suitors: Be it enacted, that it shall

* The sum of 75*l.* has been so settled.

† By stat. 30 & 31 Vict. c. 122, s. 12, this section is to be read as if these words in italics were omitted.

and may be lawful for the Commissioners of Her Majesty's Treasury, and they are hereby required forthwith to prepare or cause to be prepared a table or tables of fees, specifying what fees are proper to be demanded and taken in the said courts and offices, at the judges' chambers, and on the circuits, and what fees should be abolished; and such table or tables shall be laid for approval before the judges of the said courts; and the said judges, or any six or more of them, of whom the Lord Chief Justices and Lord Chief Baron shall be three, are hereby empowered and required, as soon as conveniently may be, to revise and settle the said table or tables of fees so prepared as aforesaid, and from time to time to add to, or reduce, alter or amend the same, as they may deem necessary and proper; and the said table or tables of fees so revised and corrected as aforesaid from time to time to allow and sanction, by affixing their signatures respectively thereto and to establish the same in and for the said courts; and the said Commissioners of Her Majesty's Treasury are required, so soon and as often as each table or tables of fees have been sanctioned and allowed by the judges, to cause the same to be inserted and published in the London Gazette; and from and after such publication no other fees than those sanctioned and allowed as aforesaid shall on any pretence whatever be demanded or taken by any officer or clerk of the said courts in respect of any duty or service to which such table or tables of fees may relate: provided that until the publication of such table or tables of fees under the authority aforesaid, the fees now lawfully taken by the said officers and clerks shall and may continue to be taken.

For the Table of Fees made in pursuance of this section, see *post* (pp. 516—520). These fees are now collected by stamps in pursuance of stat. 28 Vict. c. 45 (*post*, p. 521), in the manner provided by Rules of 15th December, 1865, *et seq.* (*post*, pp. 525—531).

Officer and clerks not to act as barristers, attorneys or agents.

By section 11, no person holding the office of associate or the appointment of judge's clerk, or of clerk in any of the offices of the Superior Courts, shall, either directly or indirectly, act as a barrister, attorney or solicitor, or as agent of any attorney or solicitor, in any court of law or equity in the United Kingdom, either separately or in partnership with any other, during such time as he shall hold such office of associate, or act as such clerk. Saving clause for attorneys and solicitors then practising and holding such appointment.

By section 12, the Commissioners of the Treasury are authorized to fix the salaries of the officers and clerks, which salaries they shall be entitled to receive in lieu of all fees and emoluments now received by such officers and clerks respectively.

By section 13, the salaries and compensation allowances by way of salary, granted to the several officers and clerks of the said courts respectively, shall be chargeable upon the fees received by the said officers and clerks in the said courts respectively; and the surplus of such fees arising in each of

the said courts, after the payment of the said salaries and expenses, shall be paid into the exchequer to the credit of the consolidated fund. In the event of the fees so received by the said officers and clerks being at any time insufficient to defray the salaries and compensations, the Commissioners of the Treasury may direct the amount of such deficiency to be charged upon and paid out of the said consolidated fund.

*Repealed by 28 Vict. c. 45, s. 8.**

By section 14, *the officers and clerks were to render accounts of fees received to the Treasury.*

By section 15, allowances may be granted to officers on their retirement from office.

Ushers and subordinate officers, and their deputies, to render accounts of fees to Treasury.

16. And whereas the ushers, court-keepers, messengers, assistants, and other subordinate officers of the said Superior Courts, and attendants on the judges (other than the judges' clerks hereinbefore mentioned) are entitled to receive fees from the suitors in the said court, and it is expedient that the said suitors should be relieved from the payment of such fees, and that adequate salaries should be provided for such officers, assistants and attendants: Be it enacted, that all persons holding any subordinate offices or appointments in any of the said Superior Courts, as ushers, court-keepers, messengers, assistants and the like, or as attendants on the judges (other than the judges' clerks hereinbefore mentioned), and their deputies, shall respectively, on or before the twenty-fourth day of October, one thousand eight hundred and fifty-two, render a true account in writing to the said Commissioners of Her Majesty's Treasury of all fees and emoluments received or claimed to be received by them, or on their behalf, and also of the annual value of all such fees and emoluments received by them, or on their behalf, and also of the annual salary, allowances, or profits allowed to or received by them respectively, whether as principals or deputies, and also of the nature and amount of disbursements, if any, in respect of any of such offices or appointments, for the space of five years next preceding the passing of this act; and the accounts so rendered shall be in such form, and with such particulars of receipt or otherwise, and accompanied by such vouchers, as the said Lords Commissioners shall from time to time think proper to require and direct.

Fees of such subordinate officers may be abolished.

17. It shall and may be lawful for the said Commissioners of Her Majesty's Treasury, and they are hereby empowered by and with the consent of the said Lord Chief Justices and the Lord Chief Baron, to abolish all or any of the fees set forth in such accounts; and a list or lists, specifying the nature or description of the fees so to be abolished, shall thereupon be published by and under the authority of the said Commissioners of Her Majesty's Treasury in the Lon-

* *Post*, p. 522.

don Gazette; provided that until such publication all fees that now are or may be legally received in respect of such subordinate offices or appointments, shall and may continue to be received as heretofore.

The number of subordinate officers to be fixed by Treasury, with the sanction of the Chief Justices and Chief Baron.

18. It shall and may be lawful for the said Commissioners of Her Majesty's Treasury, and they are hereby empowered and required, by and with the sanction of the said Lord Chief Justices and the Lord Chief Baron, as soon as conveniently may be, to ascertain and fix the number of ushers, court-keepers, messengers, and other subordinate officers, and assistants in the said Superior Courts, and of attendants on the judges (other than the judges' clerks hereinbefore mentioned), which shall be sufficient for the due performance of the duties required to be rendered in respect of such subordinate offices and appointments, and for the necessary attendance on the judges; and a list or lists of the offices and appointments, when so fixed and ascertained, shall thereupon be published by and under the authority of the said Commissioners of Her Majesty's Treasury in the London Gazette; and from and after such publication all such of the said offices and appointments as are not contained in such list or lists shall be and the same are hereby declared to be abolished.

By section 19, the Chief Justices and Chief Baron are respectively authorized to appoint fit and proper persons to perform the duties of the said several subordinate offices and appointments, when such offices and appointments shall have been fixed and ascertained in the manner hereinbefore provided.

By section 20, power is given to increase or reduce the number of such subordinate officers.

By section 21, the salaries of the subordinate officers are to be fixed by the Treasury, with the sanction of the Chief Justices and Chief Baron, and to be paid out of the Consolidated Fund.

Section 22, provides for compensation to the Hereditary Chief Proclamator and Hereditary Chief Usher.

Section 23, provides for compensation to the officers appointed by the Hereditary Chief Proclamator and Hereditary Chief Usher, and to subordinate officers.

By section 24, nothing herein contained is to affect the right of the existing four patent messengers of the Court of Exchequer.

Appointments to be made without pecu-

25. All appointments of officers and clerks to be made by virtue of this act shall be so made without any pecuniary or other consideration whatsoever, directly or indirectly, to be

Salary consideration.

paid or received for the same; and all such officers and clerks shall execute their duties in person, and shall give their attendance in court or elsewhere, and shall conduct the business of their several departments or offices at such places and hours, whether in term time or vacation, and in every respect in such manner as the Lord Chief Justices or the Lord Chief Baron, and the other justices and barons of the said courts respectively, shall from time to time order and direct.

Officers and clerks not to receive gratuities on pain of dismissal.

26. If any officer of the said courts, or any clerk appointed or to be appointed under or by virtue of this act, or any person whatever employed in the offices of the said courts, shall, for anything done or pretended to be done relating to his office or employment, or under colour of doing anything relating to his office or employment, or for forbearing to do any act properly appertaining to his said office, demand, take, receive or accept, or allow any person whatsoever to take for him, or on his account, or for or on account, of or in trust for him or any other person named by him, any gratuity, perquisite, or reward, or anything of value, other than the salary or remuneration allowed or to be allowed to every such officer, clerk, or person aforesaid, he shall forfeit a sum of fifty pounds, to be recovered by action of debt at the suit of Her Majesty's Attorney-General, and upon judgment being recovered therein he shall be incapable of any longer holding his office or employment.

By section 27, no compensation is to be allowed for the loss of any right of appointment.

Certain fees on circuit abolished.

28. And whereas upon the circuits of the judges of assize and gaol delivery, a fee of six shillings and eightpence is now paid on every cause to the marshals of the judges of assize for the use of the judge: Be it enacted, that the said fee, and all other payments upon the circuits to or to the use of the said judges, shall be and they are hereby abolished.

*Repealed by 28 Vict. c. 45, s. 8.**

Section 29, provides that accounts shall be laid before Parliament.

Duties to be performed in person.

30. Where it shall be made to appear to the said Commissioners, that any of the hereinbefore-mentioned officers omits to perform the duties of his office in person, the said Commissioners, unless it shall be shown to their satisfaction that such omission arises from temporary and unavoidable causes, and they shall in writing approve of such omission for a period not exceeding at any one time six months, shall, as the case may be, require the whole of the fees due to or received by such officer for his own use during the time of such omission to be accounted for and paid over as aforesaid, or shall cease

* *Post*, p. 522.

to allow or pay any salary otherwise due to such officer during the time of such omission.

Fees of marshal's men and judge's bailiff abolished.

31. The fees heretofore received on the circuit by the marshal's man and the judge's bailiff respectively shall be and are hereby abolished; and no fee, gratuity, or reward whatsoever shall be demanded or accepted by any one exercising or claiming to exercise either of the said offices, or by any servant or other person attending the circuit in any subordinate office or employment.

As to performance of duties of hereditary chief usher and messenger of the Court of Exchequer.

32. And whereas, by reason of abolishing the office of Hereditary Chief Usher of the Court of Exchequer, and the officers of the said court appointed by that officer, it becomes necessary to make provision for the duties hitherto performed by the said Hereditary Chief Usher and persons, styled "Messengers of the Court of Exchequer," holding offices or places in the patronage of and appointed by the said Hereditary Chief Usher: the duties hitherto performed by the said Hereditary Chief Usher and messengers of the Court of Exchequer, so far as regards the process issued and issuing from the office of Her Majesty's remembrancer in the Court of Exchequer, and of the treasurer of the governors of the bounty of Queen Anne, on the seal day next after each and every term, shall, from and after the abolition of the said offices of messengers of the Court of Exchequer, be discharged by Her said Majesty's remembrancer, and his officers under his direction, and the officers of the said treasurer of the governors of the bounty of Queen Anne, and shall be in all respects as valid and effectual to all intents and purposes as if performed by the said Hereditary Chief Usher and messengers of the Court of Exchequer as heretofore, any law or usage to the contrary notwithstanding; and that it shall not be necessary in future for the process, hereinbefore referred to, to be sealed before or in the presence of the Cursitor Baron of the said Court of Exchequer on the said seal days as heretofore, but the same may be issued from the office of Her said Majesty's remembrancer and the office of the treasurer of the governors of the bounty of Queen Anne, and be respectively sealed in the office of Her said Majesty's remembrancer, who has the custody or keeping of the Great Seal of the Exchequer.

TABLES OF FEES.

Wednesday, November 24, 1852.

In pursuance of an act passed in the session of Parliament held in the fifteenth and sixteenth years of the reign of Her Majesty, chapter seventy-three, entitled "*An Act to make Provision for a permanent Establishment of Officers to perform the Duties at Nisi Prius in the Superior Courts of Common Law, and for the Payment of such Officers and of the Judges' Clerks by Salaries, and to abolish certain Offices in those Courts*;" We, the undersigned, being two of the Commissioners of Her Majesty's Treasury, have caused the under-mentioned Tables of Fees* to be prepared, specifying the fees proper to be demanded and taken in the offices under mentioned, and at the Judges' Chambers, in the Superior Courts of Common Law; and that all other fees in such offices and chambers should be abolished, namely:—

Offices of the Masters of the Three Superior Courts.

	£	s.	d.
Every writ (except writ of trial or subpœna).. ..	0	5	0
Every concurrent, alias, pluries or renewed writ ..	0	2	6
Every writ of trial	0	2	0
Every writ of subpœna before a judge or master ..	0	2	0
——— before the sheriff	0	1	0
Every appearance entered	0	2	0
——— each defendant after the first ..	0	1	0
Filing every affidavit, writ or other proceeding ..	0	2	0
Amending every writ or other proceeding	0	2	0
Every ordinary rule	0	1	0
Every special rule, not exceeding six folios	0	4	0
——— exceeding six folios, per folio ..	0	0	6
Note.—Plans, section, &c., accompanying rules to be paid for by the party taking the rule, according to the actual cost.			
Every judgment by default	0	5	0
Every final judgment, otherwise than judgment by default	0	10	0
Taxing every bill of costs, not exceeding three folios.	0	2	0
——— exceeding three folios, when taxed as between party and party, per folio ..	0	0	6
——— exceeding three folios, when taxed as between attorney and client, or where the attorney taxes his own bill, per folio	0	1	0
Every reference, inquiry, examination, or other special matter, referred to the Master, for every meeting, not exceeding one hour	0	10	0
——— for every additional hour or less ..	0	10	0
Upon payment of money into court, viz.:—			
for every sum under £50 ..	0	5	0
£50 and under £100 ..	0	10	0
£100 and above that sum ..	1	0	0

* See s. 10, n. (*ante*, p. 511).

	£	s.	d.
Every certificate	0	1	0
Office copies of præcipe or other proceedings, per folio	0	0	6
Every search, if not more than two terms	0	0	6
——— exceeding two, and not more than four terms	0	1	0
——— exceeding four terms, or a general search ..	0	2	6
Every affidavit, affirmation, &c., taken before the Master	0	1	0
Filing every recognizance or security in ejectment or error	0	2	6
Every allowance and justification of bail	0	3	0
For taking special bail as a commissioner	0	2	0
Filing affidavit, and enrolling articles previous to the admission of an attorney	0	5	0
Every re-admission of an attorney	0	5	0

All other fees than those before mentioned are hereby abolished, and are not to be taken by any person in the Masters' offices under any pretence whatever.

Offices of the Associates to the Three Chief Judges.

The table given by this order has been abolished, and another substituted for the same, *post*, p. 519.

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*Chambers of the Chief and Puisne Judges.**

	£	s.	d.
Every summons to try an issue before the sheriff ..	0	1	0
Every other summons whatever, whether in term or vacation	0	2	0
Every order to try an issue before the sheriff	0	1	0
Every other order whatever of an ordinary nature ..	0	2	0
Every order of a special nature, such as reference to arbitration, or attendance of witnesses at arbitration; service of process on persons residing abroad; reference to the master to fix sum for final judgment; revival of judgment, and the like	0	5	0
Every fiat, warrant, certificate, caveat, special case, special verdict, or the like	0	5	0
Every affidavit, affirmation, &c., whether in term or vacation, each deponent	0	1	0
Every affidavit kept for the purpose of being conveyed to the proper office to be filed	0	1	0
Every proceeding filed	0	2	0
Every admission of an attorney	1	0	0
Every approbation of commissioners for taking affidavits or special bail	0	2	6
Every commission for taking affidavits or special bail, exclusive of stamp duty, engrossing and sealing .	1	0	0

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* The notice that has been issued relating to the payment of these fees by stamps will be found, *post*, p. 528.

The same fees are to be taken in proceedings before the masters under 30 & 31 Vict. c. 68, as in the same proceedings before the judges. R. G., M. T. 1867 (*ante*, p. 465).

	£	s.	d.
Every other commission for any purpose whatever, exclusive of stamp duty, engrossing and sealing ..	0	10	0
Every acknowledgment by married women	0	10	0
Office copies of judge's notes, or of any other proceeding whatever, per folio	0	0	6
Every recognizance or bond of any description whatever	0	10	0
Every allowance of writ of error	0	10	0
Bail on cepi corpus, habeas corpus, error or ejectment	0	2	0
Delivering bail piece off the file, or justification of bail	0	2	0
Every committal	0	5	0
Every exhibit signed by judge	0	1	0
Producing judge's notes	0	5	0
Bill of exceptions signed by judge	0	5	0
Order in legacy duty cases	0	5	0
Crown revenue cases, from defendant	0	5	0
Attendance in any court or otherwise, under subpœna or special order of court, to give evidence, or produce documents .. .. .. per day	1	0	0
Attendance as a commissioner to take affidavit, &c., or at a judge's house, or elsewhere, at request of parties	0	10	0
Appointment of commissioners under glebe exchange	1	0	0
Allowance of bye-laws or table of fees	1	0	0
Report on private bill	5	0	0
Attendance by counsel, each side	0	5	0

Note.—All plans, sections, &c., accompanying any order or office copy to be paid for by the party, according to the actual cost.

In cases where the party has been allowed to sue *in formâ pauperis*, the fees are not to be demanded or taken, nor in cases where such fees would be payable by any Revenue or other Government department.

All other fees than those before mentioned are hereby abolished, and are not to be taken by any person at the judges' chambers under any pretence whatever.

Given under our hands at the Treasury Chambers, Whitehall, this twentieth day of November, 1852.

Chandos,
Thos. Bateson, } Two of the Commissioners of Her Majesty's Treasury.

We, the undersigned Judges of the Superior Courts of Common Law, do settle, allow, and sanction the before-mentioned table of fees prepared by the Commissioners of Her Majesty's Treasury, and we do hereby establish the same, under the provisions of the aforesaid act.

Dated the twenty-second day of November, 1852.

Campbell, Lord Chief Justice of the Court of Queen's Bench.

John Jervis, Lord Chief Justice of the Court of Common Pleas.

Fred. Pollock, Lord Chief Baron of the Court of Exchequer.

W. H. Maule,
E. V. Williams,
T. N. Talfourd, Judges of the Court of Common Pleas.

The before-mentioned tables of fees having been sanctioned and allowed by the Lord Chief Justices, the Lord Chief Baron, and other Judges, as required by the said act, we do hereby order that the said tables of fees be inserted and published in the London Gazette.

Treasury Chambers, Whitehall, the twenty-second day of November, 1852.

Chandos,
Thos. Bateson, } Two of the Commissioners of Her Majesty's Treasury.

FEES TO BE TAKEN BY THE ASSOCIATES.

In pursuance of an act passed in the session of Parliament held in the fifteenth and sixteenth years of the reign of Her Majesty, chapter 73, intituled "*An Act to make provision for a permanent Establishment of Officers to perform the Duties at Nisi Prius in the Superior Courts of Common Law, and for the Payment of such Officers and of the Judges' Clerks by Salaries, and to abolish certain Offices in those Courts;*" We, the undersigned, have caused the under-mentioned altered and amended *Table of Fees to be prepared, specifying the fees proper to be demanded and taken by the associates in the Superior Courts of Common Law, namely:—

	£	s.	d.
On entering any cause for trial	1	0	0
On receiving the record	1	0	0
On returning the postea	1	0	0
On re-entering and receiving the record of any cause which has been withdrawn or struck out	1	0	0
On receiving a writ of subpœna to attend any court ..	1	0	0
For attendance at any court on a writ of subpœna for every day after the first day	1	0	0

All other fees than those before mentioned are hereby abolished, and are not to be taken by any person in the Associates' offices under any pretence whatever.

A. E. Cockburn, Lord Chief Justice of the Court of Queen's Bench.
W. Erle, Lord Chief Justice of the Court of Common Pleas.
Fred. Pollock, Lord Chief Baron of the Court of Exchequer.
G. Bramwell, Baron of the Court of Exchequer.
Colin Blackburn, Justice of the Court of Queen's Bench.
Montague Smith, Justice of the Court of Common Pleas.

N.B.—*The above rules were published in the London Gazette of the 28th December*, 1855.

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* The original table of fees to be taken in the Associates' offices, and hereby abolished, was allowed by the judges on the 22nd November, 1852.

FEES OF CLERKS OF ASSIZE.*

In pursuance of an act passed in the session of Parliament held in the 15th and 16th years of the reign of Her Majesty, chapter 73, entitled "*An Act to make provision for a permanent Establishment of Officers to perform the Duties at Nisi Prius in the Superior Courts of Common Law, and for the Payment of such Officers and of the Judges' Clerks by Salaries, and to abolish certain Offices in those Courts;*" We, the undersigned, have caused the under-mentioned altered and amended† Table of Fees to be prepared, specifying the fees proper to be demanded and taken by the clerks of assize as associates and their officers in reference to proceedings at Nisi Prius on the circuits, namely:—

	£	s.	d.
On entering any cause for trial	2	0	0
On returning the postea	1	0	0
On re-entering the record of any cause that has been withdrawn or struck out	1	0	0
On receiving a writ of subpœna to attend any Court	1	0	0
For attendance at any court on a writ of subpœna for every day after the first day	1	0	0

All other fees than those before mentioned are hereby abolished, and are not to be taken by any of the above-mentioned officers under any pretence whatever.

A. E. COCKBURN, Lord Chief Justice of the Court of Queen's Bench.
W. ERLE, Lord Chief Justice of the Court of Common Pleas.
FRED. POLLOCK, Lord Chief Baron of the Court of Exchequer.
SAMUEL MARTIN, JAS. WILLES, COLIN BLACKBURN, Judges of the Superior Courts of Common Law.

The before-mentioned altered and amended table of fees having been sanctioned and allowed by the Lord Chief Justices, the Lord Chief Baron, and other judges, as required by the before-mentioned act of parliament, we do hereby order that the said table of fees be inserted and published in the London Gazette.

Treasury Chambers, Whitehall, the 12th day of February, 1866.

W. E. GLADSTONE,
LUKE WHITE,
Two of the Commissioners of Her Majesty's Treasury.

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* For the rules issued for the collection of these fees by stamps, *vide post*, p. 529.

† The original table of fees hereby abolished, was allowed by the judges on the 24th of February, 1853.

THE COMMON LAW COURTS (FEES) ACT, 1865.

[28 VICT. c. 45.]

An Act to provide for the Collection by means of Stamps of Fees payable in the Superior Courts of Law at Westminster, and in the Offices belonging thereto. [19th June, 1865.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

From and after Dec. 31, 1865, all fees payable in superior courts to be collected by stamps.

1. From and after the thirty-first day of December, one thousand eight hundred and sixty-five, or from and after such earlier time as the Commissioners of Her Majesty's Treasury, with the concurrence of the Lord Chief Justices of the Courts of Queen's Bench and Common Pleas and of the Lord Chief Baron of the Court of Exchequer, by notice published in the London Gazette, appoint, the following fees shall be collected by stamps; namely,—all fees for the time being payable in the several courts and offices, or to the several officers, or in respect of the several matters, specified in the first schedule to this act, whether under the several enactments therein specified, or otherwise, and all fees whatever for the time being payable under any of those enactments.

Stamps to be impressed or adhesive.

2. All or any stamps to be used under this act shall be impressed or adhesive, as the Commissioners of Her Majesty's Treasury from time to time direct.

General rules to be made by Treasury.

3. The Commissioners of Her Majesty's Treasury, with the concurrence of the Lord Chief Justices and Lord Chief Baron, may from time to time make such rules as seem fit for regulating the use of stamps under this act, and particularly for prescribing the application thereof to documents from time to time in use or required to be used for the purposes of such stamps, and for ensuring the proper cancellation of adhesive stamps and keeping accounts of such stamps.

Under the power conferred by this section, rules (*post*, pp. 525—531) have been issued.

Documents not properly stamped to be invalid.

4. Any document which ought to bear a stamp under this act shall not be of any validity unless and until it is properly stamped; but if any such document is through mistake or inadvertence received, filed, or used without being properly stamped, a judge of one of the said courts may, if

he thinks fit, order that the same be stamped as in such order may be directed, and on such document being stamped accordingly the same and every proceeding relative thereto shall be as valid as if such document had been properly stamped in the first instance.

Nothing to interfere with powers of Treasury, &c. for alteration of fees, &c.

5. Nothing in this act shall interfere with the exercise by any of the judges of the said courts, or by the Commissioners of Her Majesty's Treasury, or by any other authority, of any power of altering or otherwise regulating the amount of any fees comprised in this act, or of any salaries or other charges for the time being by law payable thereout or charged thereon, or of directing that any fees comprised in this act shall cease to be applicable to any charges or payments charged thereon or payable thereout, and shall be from time to time paid into the receipt of the exchequer, and be carried to and form part of the consolidated fund of the United Kingdom.

By section 6, the payment of salaries, &c., out of the money received for stamps, is provided for.

Section 7 provided that the accounts should be laid before Parliament.

This section is repealed by stat. 29 & 30 Vict. c. 101, s. 6; which act, by s. 7, makes provision for these accounts being laid before parliament.

Repeal of enactments in second schedule.

8. From and after the time appointed for the commencement of the collection of fees by means of stamps under this act, the acts described in the second schedule to this act shall be repealed to the extent in that schedule specified.

9. This Act may be cited as "The Common Law Court (Fees) Act, 1865."

THE FIRST SCHEDULE.

15 & 16 Vict. c. 73, s. 10 (7 Will. 4 & 1 Vict. c. 30 18 & 19 Vict. c. 126, s. 20)	The Superior Courts, and their several offices, judges' chambers, and clerks of assize acting as associates on circuits.
6 & 7 Vict. c. 20, s. 15 (23 & 24 Vict. c. 54)	Crown office, Queen's Bench.
17 & 18 Vict. c. 36, ss. 3, 4, 5	Registration of bills of sale, Queen's Bench.
3 & 4 Will. 4, c. 74, s. 89 5 & 6 Will. 4, c. 82, s. 6 13 & 14 Vict. c. 75 (17 & 18 Vict. c. 75 20 & 21 Vict. c. 57—as to England 25 & 26 Vict. c. 67, s. 36 25 & 26 Vict. c. 96)	Registration of certificates, &c. of acknowledgments of deeds of married women, &c., Common Pleas.
1 & 2 Vict. c. 110, s. 19 2 & 3 Vict. c. 11, ss. 2, 4, 7, 8, 9 13 & 14 Vict. c. 75 18 & 19 Vict. c. 15—as to Common Pleas 23 & 24 Vict. c. 115, s. 2 (3 & 4 Vict. c. 82 13 & 14 Vict. c. 35, s. 17 16 & 17 Vict. c. 107, ss. 195—197—as to England 22 & 23 Vict. c. 35, s. 22 23 & 24 Vict. c. 38, s. 4 24 & 25 Vict. c. 134, s. 213 25 & 26 Vict. c. 89, s. 114) 27 & 28 Vict. c. 112, s. 3	Registration of judgments, crown debts, &c., Common Pleas.
5 & 6 Vict. c. 86, s. 4 (22 & 23 Vict. c. 21, ss. 1—4)	Queen's remembrancer's office.

THE SECOND SCHEDULE.

Session and Chapter.	Title.	Extent of Repeal.
5 & 6 Vict. c. 86..	An Act for abolishing certain offices on the revenue side of the Court of Exchequer in England, and for regulating the office of her Majesty's remembrancer in that Court.	Section five.
6 & 7 Vict. c. 20..	An Act for abolishing certain offices on the crown side of the Court of Queen's Bench, and for regulating the Crown Office.	Section twelve.
13 & 14 Vict. c. 75	An Act to regulate the receipt and amount of fees receivable by certain officers in the Court of Common Pleas.	Section one.
15 & 16 Vict. c. 73	An Act to make provision for a permanent establishment of officers to perform the duties at Nisi Prius in the Superior Courts of Common Law, and for the payment of such officers and of the judges' clerks by salaries, and to abolish certain offices in those Courts.	Sections fourteen and twenty-nine.

GENERAL RULES RELATING TO THE COLLECTION OF FEES BY STAMPS.

[PURSUANT TO ACT 28 VICT. C. 45.]

WHEREAS by an act passed in the session of Parliament held in the 28th year of the reign of Her Majesty, c. 45, entitled "An Act to provide for the collection by means of Stamps of Fees payable in the Superior Courts of Law at Westminster, and in the Offices belonging thereto," it is provided by the third section thereof, that the Commissioners of Her Majesty's Treasury, with the concurrence of the Lord Chief Justices and of the Lord Chief Baron, may from time to time make such rules as seem fit for regulating the use of the stamps under this act, and particularly for prescribing the application thereof to documents from time to time in use or required to be used for the purposes of such stamps, and for ensuring the proper cancellation of adhesive stamps, and keeping account of such stamps: Now we, being two of the Lords Commissioners of Her Majesty's Treasury, with the concurrence of the Lord Chief Justices and of the Lord Chief Baron, do hereby order and direct that the following rules be observed in respect to stamps used in the Superior Courts of Common Law, and in the several offices connected therewith; the Crown Office, Queen's Bench; the Office of Registration of Certificates, &c., of Acknowledgments of Deeds of Married Women, Court of Common Pleas; the Office of Registrar of Judgments, &c., Common Pleas; the Queen's Bench Remembrancer's Office, Court of Exchequer; and in the Judges' Chambers; to take effect on and after the 1st day of January, 1866.

1. The stamps to be used for collecting the fees payable in the several offices in the Courts of Common Law at Westminster, and in the Judges' Chambers, by virtue of the above act, shall, subject to the provisions of the seventh and eighth of these rules, be stamped or affixed at the expense of the parties liable to pay such fees on or to the vellum, parchment, or paper, on which the proceedings, in respect whereof such fees are payable, are written or printed, or which may be otherwise used in reference to such proceedings.

2. Where any of such fees are payable in respect of any matter or thing to be done by any officer or in any office of the said courts, or at the Judges' Chambers, and it shall not have been customary to use any written or printed document

or paper in reference to such matter or thing whereon the stamp could be stamped or affixed, the party or his attorney requiring such matter or thing to be done, or permitted to be done, shall make application for the same by a præcipe or short note in writing or print, and a stamp denoting the amount of the fee so payable shall be stamped or affixed to such præcipe or note.

3. All adhesive stamps affixed to any paper or document presented to or kept in the possession of any of the officers of the said courts, or of the clerks to the judges, shall, before the act is done or permitted to be done, in respect of which the fee denoted by such stamp is payable, be effectually cancelled by some officer of the said courts, or by one of the said clerks to the judges, by obliterating the same by means of a hand-stamp and printing ink,* showing the date of the cancellation, and no such document shall be filed or delivered out until the stamp thereon shall have been cancelled or defaced in manner aforesaid.

4. That when any summons, order, or other document has been issued by mistake, and the stamp thereon has been cancelled without having been legitimately used, the Master, Associate, or other proper officer of the department to which the fee is payable, or the judge's clerk, shall certify that such stamps are fit subjects for allowance, and it shall be competent to the Board of Inland Revenue, upon the presentation of such certificate, to allow the amount thereof.

5. That distributors of stamps, and all persons licensed to sell stamps in England and Wales, shall be permitted to sell the stamps above referred to, and that an office be provided in or attached to the Judges' Chambers for the sale of stamps.

6. The several officers of the said courts, and the clerks to the several judges, shall, on or before the 30th day of April in each year, make out an account of all stamps cancelled in their respective offices, specifying the number of each denomination, and shall render such account to the Lords Commissioners of Her Majesty's Treasury, and the first of such accounts shall be for the three months ended 31st March, 1866, and the second of such accounts for the year ended 31st March, 1867, and so forth.

7. And we do hereby order and direct, that the stamps to be used for collecting the fees payable in the offices of the several Masters of the Courts of Common Law shall be

* Or by writing the initials of such officer, and the date of the stamp. Rule 26th February, 1866 (*post*, p. 530).

stamped or affixed at the expense of the parties liable to pay such fees on the several documents mentioned in the second column of the subjoined Table:

Fees taken in the Offices of the Masters of the Courts of Queen's Bench, Common Pleas, and Exchequer, in respect of	*Stamps to be affixed upon*
Every writ	Præcipe.
Every appearance	Appearance piece, which shall be of linen paper of the same size and shape as the parchment appearance pieces heretofore used.
Filing every document	Document filed.
Amending any proceeding	Order to amend.
Every rule	Rule.
Every judgment	Entry in masters' book.
Taxing bill of costs	Bill taxed.
References to, or examinations by masters	Certificate, examination or report.
Payment of money into court ..	Entry in masters' book.
Every certificate	Certificate.
Office copies of documents	Office copy.
Searches	Præcipe or note filed.
Every affidavit or affirmation ..	Affidavit, &c.
Allowance and justification of bail, taking special bail as commissioners	Bail piece.
Filing affidavit and enrolling articles of clerkship	Entry in masters' book.
Every re-admission of an attorney ..	Rule for re-admission.

8. And we do further order and direct, that a book or books be kept in the offices of the Associates of the Courts of Queen's Bench, Common Pleas, and Exchequer, in which book or books shall be entered the names of the several causes, against which shall be placed adhesive stamps of the value required during the different stages, and it shall be the duty of the Associate, or of such one of his clerks as he shall direct to do it, to cancel such stamps in the manner hereinbefore provided, immediately after they are placed in such books.

Given under our hands at the Treasury Chambers, Whitehall, this fifteenth day of December, one thousand eight hundred and sixty-five.

RUSSELL,
E. H. KNATCHBULL-HUGESSEN.

We do hereby signify our concurrence in the before-mentioned Rules and Regulations:—

A. COCKBURN, Lord Chief Justice of the Court of Queen's Bench.
W. ERLE, Lord Chief Justice of the Court of Common Pleas.
FRED. POLLOCK, Lord Chief Baron of the Court of Exchequer.

16*th December*, 1865.

For rules under this act, relating to fees on the Court of Exchequer, Revenue side (dated 18th December, 1865), see L. J. 35, Com. Law, 23.

The following notice has been issued with regard to the payment of fees in judges' chambers, by stamps.

THE JUDGES' CHAMBERS,
30*th December*, 1865.

The following regulations as to stamps on the transaction of business at these chambers will be strictly observed on and after the first day of January, 1866.

The following documents, before being presented to, or left with the judges' clerks, must have the proper stamp or stamps affixed thereon or thereto, viz.:—

	£	s.	d.
Every affidavit left or filed in support of ex parte applications	0	1	0
Every affidavit intended to be used or read or referred to prior to the application being heard before the judge	0	1	0
Every affidavit before being tendered to be sworn or affirmed (each deponent)	0	1	0
Every exhibit (requiring signature of judge or commissioner)	0	1	0
Every special or appeal case, demurrer or error book, certificate, fiat, caveat, &c.	0	5	0
* Every bail on *cepi corpus*, error, &c.	0	2	0
* Every recognizance (on bond, newspaper and the like)	0	10	0
* Acknowledgment by married women, every acknowledgment	0	10	0
* Every fiat for allowance of costs in actions under 20*l.* where judgment is signed by default for want of appearance	0	2	0

Summonses to be attended by Counsel.

Prior to the same being heard, the stamp must be affixed on the original or copy summons by the party giving the notice, and if opposed by counsel the party opposing must affix a similar stamp on the original or copy served	0	5	0

* As to these documents, "The stamp to be affixed upon a præcipe paper."

As to the following documents, the parties applying for the same must be prepared with the necessary stamp or stamps to affix thereon, viz.:—

	£	s.	d.
Every summons for writ of trial	0	1	0
Every other summons	0	2	0
Every order for writ of trial	0	1	0
Every order of an ordinary nature	0	2	0
Every order of a special nature	0	5	0
Every admission of an attorney	1	0	0
Every approbation for commission to take affidavits ..	0	2	6
Every commission for taking affidavits or special bail exclusive of stamp duty	1	0	0
Every office copy affidavit or other proceeding, per folio	0	0	6

N.B.—*These lists do not include all the fees receivable at the Judges' Chambers, but only such as are of daily occurrence.*

REGULATIONS AS TO THE PAYMENT OF FEES BY STAMPS ON THE CIRCUITS.

WHEREAS by an Act passed in the Session of Parliament held in the twenty-eighth year of the reign of Her Majesty, cap. 45, intituled "*An Act to provide for the Collection, by means of Stamps, of Fees payable in the Superior Courts of Law at Westminster, and in the Offices belonging thereto*": It is provided by the third section thereof, that the Commissioners of Her Majesty's Treasury, with the concurrence of the Lords Chief Justices and of the Lord Chief Baron, may from time to time make such rules as seem fit for regulating the use of the stamps under this act, and particularly for prescribing the application thereof to documents, from time to time, in use or required to be used for the purposes of such stamps, and for insuring the proper cancellation of adhesive stamps, and keeping account of such stamps. Now we, being two of the Lords Commissioners of Her Majesty's Treasury, with the concurrence of the Lords Chief Justices and of the Lord Chief Baron, do hereby order and direct that the following rules be observed in respect to stamps used and taken in reference to proceedings at Nisi Prius, on the circuits, by the clerk of assize acting as associate, his officers and clerks:—

1. The stamps to be used for collecting the fees payable to the clerks of assize as associates on circuit, shall be procured and paid for by the parties liable to pay such fees.

2. A book or books shall be kept by the clerks of assize acting as associates on circuit, in which book or books shall be entered the names of the several causes, against which shall be placed adhesive stamps of the value required during the different stages of a cause, and it shall be the duty of the clerk of assize acting as associate, or of his officer or clerk, to cancel such stamps immediately after they are placed in

such books, either by obliterating the same by means of a hand stamp and printing ink, or by writing his initials and the date of cancellation thereon.

3. The fees payable to the clerks of assize acting as associates on circuits, on receiving writs of subpœna and for attendance on such writs, shall be taken in stamps, which shall be affixed to such writ, and be cancelled by the clerk of assize or his officer, in the manner hereinbefore provided.

4. That when any stamp has been cancelled without having been legitimately used, the clerk of assize, or his deputy, shall certify that such stamp is a fit subject for allowance; and it shall be competent to the Board of Inland Revenue, upon the presentation of such certificate, to allow the amount thereof.

5. That distributors of stamps, and all persons licensed to sell stamps in England and Wales, shall be permitted to sell the stamps above referred to.

6. The several clerks of assize shall, on or before the 31st day of December in each year, make out an account of all stamps cancelled in their respective offices, specifying the number of each denomination, and the circuits on which such stamps were respectively received, and shall render such account to the Lords Commissioners of Her Majesty's Treasury.

Given under our hands at the Treasury Chambers, Whitehall, this 13th day of February, 1866.

W. P. ADAM.
LUKE WHITE.

We do hereby signify our concurrence in the before-mentioned Rules and Regulations.

A. E. COCKBURN, Lord Chief Justice of the Court of Queen's Bench.

W. ERLE, Lord Chief Justice of the Court of Common Pleas.

FREDERICK POLLOCK, Lord Chief Baron of the Exchequer.

REGULATIONS AS TO THE MODE OF CANCELLING STAMPS.

WHEREAS by an Act passed in the Session of Parliament, held in the twenty-eighth year of the reign of Her Majesty, cap. 45, intituled "*An Act to provide for the Collection, by means of Stamps of Fees payable in the Superior Courts of Law at Westminster, and in the Offices belonging thereto*": It is provided by the third section thereof, that the Commissioners of Her Majesty's Treasury, with the concurrence of the Lords Chief Justices and of the Lord Chief Baron, may

from time to time make such rules as seem fit for regulating the use of these stamps under this act, and particularly for prescribing the application thereof to documents, from time to time, in use or required to be used for the purposes of such stamps, and for insuring the proper cancellation of adhesive stamps, and keeping account of such stamps. And whereas, by an order made in pursuance of the said act on December 16th last, it was ordered that all adhesive stamps affixed to any paper or document, presented to or kept in the possession of any officers of the said courts, or of the clerks to the judges, should, before the act is done or permitted to be done, in respect of which the fee denoted by such stamp is payable, be effectually cancelled by some officer of the said courts, or by one of the said clerks to the judges, by obliterating the same by means of a hand stamp and printing ink, showing the date of the cancellation; and no such document should be filed or delivered out until the stamp thereon should be cancelled or defaced. And whereas it is expedient to alter the said order; now, we being two of the Lords Commissioners of Her Majesty's Treasury, with the concurrence of the Lords Chief Justices and of the Lord Chief Baron, do hereby order and direct that all stamps directed by the said order to be cancelled, may be so cancelled by writing thereon the initial letters of the name of the person by whom the same is so directed to be cancelled, and the date of such cancellation, or in the manner directed by the said order.

Given under our hands at the Treasury Chambers, Whitehall, this 26th day of February, 1866.

RUSSELL.
W. P. ADAM.

We do hereby signify our concurrence in the before-mentioned Rule.

A. E. COCKBURN, Lord Chief Justice of the Court of Queen's Bench.

W. ERLE, Lord Chief Justice of the Court of Common Pleas.

FREDERICK POLLOCK, Lord Chief Baron of the Court of Exchequer.

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